

AD-A179 936



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STUDENT REPORT

FEDERAL ACQUISITION REGULATION (FAR)
REVISIONS FOR TELECOMMUNICATIONS

MAJ JOSEPH F. THUMSER 87-2505

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REPORT NUMBER 87-2505

TITLE FEDERAL ACQUISITION REGULATION (FAR) REVISIONS
FOR TELECOMMUNICATIONS

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Submitted to the faculty in partial fulfillment of
requirements for graduation.

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AIR UNIVERSITY
MAXWELL AFB, AL 36112**

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AD-A179 936

SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188	
1a REPORT SECURITY CLASSIFICATION UNCLASSIFIED			1b RESTRICTIVE MARKINGS NONE		
2a SECURITY CLASSIFICATION AUTHORITY NONE			3. DISTRIBUTION/AVAILABILITY OF REPORT STATEMENT "A" Approved for public release; Distribution is unlimited.		
2b DECLASSIFICATION/DOWNGRADING SCHEDULE NONE					
4. PERFORMING ORGANIZATION REPORT NUMBER(S) 87-2505			5 MONITORING ORGANIZATION REPORT NUMBER(S)		
6a NAME OF PERFORMING ORGANIZATION ACSC/EDC		6b OFFICE SYMBOL (If applicable)	7a NAME OF MONITORING ORGANIZATION		
6c ADDRESS (City, State, and ZIP Code) MAXWELL AFB AL 36112-5542			7b ADDRESS (City, State, and ZIP Code)		
8a NAME OF FUNDING/SPONSORING ORGANIZATION		8b OFFICE SYMBOL (If applicable)	9 PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER		
8c ADDRESS (City, State, and ZIP Code)			10. SOURCE OF FUNDING NUMBERS		
			PROGRAM ELEMENT NO.	PROJECT NO	TASK NO
11. TITLE (Include Security Classification) FEDERAL ACQUISITION REGULATION (FAR) REVISIONS FOR TELECOMMUNICATIONS					
12 PERSONAL AUTHOR(S) THUMSER, JOSEPH F., MAJOR, USAF					
13a. TYPE OF REPORT		13b TIME COVERED FROM _____ TO _____		14. DATE OF REPORT (Year, Month, Day) 1987 April	
				15. PAGE COUNT 93	
16. SUPPLEMENTARY NOTATION					
17. COSATI CODES			18 SUBJECT TERMS (Continue on reverse if necessary and identify by block number)		
FIELD	GROUP	SUB-GROUP			
19. ABSTRACT (Continue on reverse if necessary and identify by block number) This research paper outlines changes in the telecommunications industry, their impact on the Air Force, and a comprehensive revision to the Department of Defense (DoD), Federal Acquisition Regulation (FAR) Supplement, Subpart 37.74, for acquiring telecommunication services.					
20 DISTRIBUTION/AVAILABILITY OF ABSTRACT <input type="checkbox"/> UNCLASSIFIED/UNLIMITED <input checked="" type="checkbox"/> SAME AS RPT <input type="checkbox"/> DTIC USERS			21. ABSTRACT SECURITY CLASSIFICATION UNCLASSIFIED		
22a NAME OF RESPONSIBLE INDIVIDUAL ACSC/EDC, MAXWELL AFB AL 36112-5542			22b TELEPHONE (Include Area Code) (205) 293-2483		22c OFFICE SYMBOL

PREFACE

This research paper outlines changes in the telecommunications industry, their impact on the Air Force and a comprehensive revision to the Department of Defense (DoD), Federal Acquisition Regulation (FAR) Supplement, subpart 37.74, for acquiring telecommunication services.

The paper first examines the inventing of the telephone and its growth into a major monopoly. The monopoly is traced from creating consumer dependence through the traumatic changes which split and fractured the telecommunications industry. Such changes delivered devastating alterations in telecommunication service and negatively affected consumers. In light of these changes, the major problems affecting the Air Force are presented. Potential corrective actions are discussed and, as a partial solution to these problems, a comprehensive revision to the DOD FAR Supplement is offered.

This report and proposed DOD FAR Supplement will be submitted, via HQ AFCC/LGC to HQ USAF/RDC and OSD for consideration. Format of the proposed supplement is in accordance with DOD FAR Supplement 1.104-2.

Format of the Regulatory Changes Case, Appendix D, to be submitted to the DOD FAR Committee is in accordance with Air Force Acquisition Circular (AFAC) 85-26, dated 20 August 1985.

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EXECUTIVE SUMMARY



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REPORT NUMBER

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AUTHOR(S)

MAJOR JOSEPH F. THUMSER, USAF

TITLE

FEDERAL ACQUISITION REGULATION (FAR)
REVISIONS FOR TELECOMMUNICATIONS

I. Purpose. To revise the Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement for the acquisition of telecommunication services.

II. Problem. As a telecommunications consumer, the armed forces have depended on monopolies to provide telecommunication services for over 75 years. In light of the Federal Communications Commission (FCC) deregulation of the telecommunications industry and the divestiture of AT&T, the Air Force can no longer rely on monopolies as they have been split up and overpowered by a competitive marketplace. The Air Force must understand the effects deregulation and divestiture have had on its acquisition of telecommunication services and adjust its acquisition policies and procedures to assure continued commercial service in fulfilling mission needs.

III. Discussion. The Air Force has been thrown from the age of responsive "one-stop-shops" for telecommunication service, where it was protected from the monopoly by government regulation, into the competitive market era where the philosophy is "consumer beware" if he isn't responsible and active in protecting his rights. As a result of deregulation and divestiture, the Air

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Force, and all of DOD, have involuntarily assumed new telecommunications responsibilities, i.e., identifying telecommunications requirements, providing base-level technical expertise, enforcing contract requirements, and competitively acquiring service. There are few resources in place to satisfy these new responsibilities. The Air Force lacks sufficient technical resources to identify current needs or plan for long-range requirements; contractor performance remains subject to local level "working relationships" in lieu of aggressive contract administration; and policies and procedures governing most of these acquisition issues have yet to be revised to reflect the new business environment.

IV. Conclusion. The Air Force, and the DOD, must change its acquisition and management practices if it is to become a responsibly aggressive telecommunication consumer. The principles of competition, effective contract writing, government oversight of contractor performance, and technical competence must be adopted by DOD's telecommunication acquisition community. To do anything less will result in the potential compromise of scarce budget resources.

V. Recommendations. The DOD should revise its FAR Supplement for acquiring telecommunication services. A proposed draft of such revision is included as Appendix A.

Chapter One

INTRODUCTION

BACKGROUND

AF Manual 1-1, Basic Aerospace Doctrine of the United States Air Force, establishes the principle that effective communications is an essential part of command and control of aerospace forces. Specifically AFM 1-1 states that communications are critical to "centralized control and decentralized execution." Thus, today's Air Force, and on a larger scale, the Department of Defense (DoD), must ensure that effective communications become second nature in all activities and operations.

Despite the importance of communications, the Air Force and DoD's attitude towards the base-level (post campus) telecommunications network has long been one of taking the system for granted. Indeed, little attention is given to our desktop communicator until it doesn't work. At that point, our link with the base community, the Air Force, and the world is severed and our command, control, and communication activities are impaired. Immediate restoration of service is expected; anything less is unsatisfactory.

This attitude toward base-level telecommunications may sound unreasonable and negligent; but in reality, it is normal! Such was the attitude created with the birth of the telephone and it evolved throughout the expansion of the telecommunications industry. Monopolistic control and consumer reliance bred universal telecommunications service which was responsive to customer requirements. Indeed anything less than excellent service by the telecommunications industry was grounds for intervention by government regulatory bodies. Thus, the Air Force's normal attitude was the result of a close-looped system which exchanged government controlled prices for government controlled service. Our expectations of excellent service and the restoration of same whenever it went down were provided for by the system of government controls.

The communications dilemma which faces the Air Force and the DoD today is that our consumer attitudes, policies and procedures relative to base level commercial telecommunication services have not changed; but the close-looped system of government controls

that we relied on as consumers has changed traumatically. Since the early 1980s, telecommunication services have been largely deregulated, subject to the competitive scramble of a technologically dynamic open market. Compounding the trauma was the 1 January 1984 divestiture of the American Telephone and Telegraph (AT&T) Company. AT&T's breakup dismembered the DoD's single most important end-to-end telecommunications common carrier.

To fully understand today's telecommunications dilemma, we will first examine the history of the telecommunications market--how it started, grew to be dominated by AT&T, and resulted in the divestiture of AT&T. Having gained a historical perspective of telecommunications, the issues created by the industry's restructuring will be examined, focusing on those acquisition problems confronting the DoD. Finally, corrective actions will be proposed as revised acquisition policies and procedures to be incorporated in the DoD Federal Acquisition Regulation (FAR) Supplement.

"There was once a day when one organization could deliver any (telecommunication) need. That day is gone, never to return" (1:141). If the Air Force is to acquire effective base-level telecommunication services for tomorrow, we must understand the evolution of and recent revolution in telecommunications and change our policies and procedures accordingly. Anything less will degrade our command and control capabilities; an unaffordable expense in the employment of aerospace power.

Chapter Two

THE EVOLUTION OF TELEPHONE SERVICE AND GOVERNMENT REGULATION

THE EVOLUTION OF TELEPHONE SERVICE

The late 1800s were a creative Eden for the United States. In 1879, Edison invented electric light; in 1895, Professor Roentgen discovered x-rays; and in 1879, George Selden was granted the first horseless carriage patent. There was to be another technological development in the late 1800s which would change the world. It was a device which would overcome time and space in the transmitting of information. This device was the telephone.

The telephone's future began when Alexander Graham Bell started working, not on it, but on a harmonic telegraph in 1872. His research was sporadic, venturing between that project and his profession as a speech therapist for the deaf. In January 1875, Bell resolved to pursue the harmonic telegraph and dedicated himself to the task as did his new assistant, Thomas A. Watson. February of 1875 was significant as Bell gained financial backing. Bell received financial support from Mr. Gardiner Hubbard and Mr. Thomas Sanders in exchange for sharing in the benefits of any resulting invention. To this end, the three gentlemen executed a patent agreement. Despite this backing, however, Bells' telegraph work was not progressing well. By the spring of 1875, Bell's morale was sagging; not only was his work failing, but he found himself in competition with Elisha Gray, cofounder of the Western Electric Company (3:90). Fate, however, was to rest with Bell. On June 2, 1875, while working on the harmonic telegraph, Bell and Watson clumsily began plucking at their unit's recalcitrant transmitting reeds" and instead of sending a coded message, transmitted tones (3:95)! This led, on June 3, to the construction of the first "gallows telephone" (4:95). Performance of this telephone was lacking, however, as only faint tones and an occasional word could be heard. Bell persevered, however, and early on February 14, 1876, Gardiner Hubbard, Bell's associate, filed Alexander Graham Bells patent no. 174,465 entitled "Improvements in Telegraphy." This patent, allowed on 3 March 1877, and issued on 7 March 1877, made Bell the owner of telephone technology (3:95).

Bell may have owned the technology, but he still didn't have a working telephone. This was to change rather rapidly. Bell's first successful experiment in transmitting the human voice over wire occurred on 10 March 1876. Bell next demonstrated the value of voice communication by setting up a one-way telephone call from Paris, Ontario, to Brandford, Ontario (a distance of several miles) over borrowed outdoor telegraph wires. This was followed in October 1876 by the first outdoor two-way telephone call from Boston to Cambridge, Massachusetts (3:99).

The technology, now proven, was ready for market. In the fall of 1876, Gardiner Hubbard made a historic business offering. He offered all rights and patents of the telephone to Western Union for \$100,000. Western Union rejected this offer! Bell-Gardiner-Thomas, being unable to sell their invention to a company already having a communication distribution system, set out to build their own; and on July 9, 1877 the Bell-Gardiner-Thomas patent agreement was superseded by the Bell Telephone Company (3:99). August 1, 1877 saw the first issuance of Bell Stock. Thomas Sanders and Mabel Hubbard received 1497 shares each; Gardiner Hubbard, 1387 shares; Thomas A. Watson, 499 shares; Gertrude McC. Hubbard, 100 shares; Charles Eustis Hubbard (Gardiner's brother), 10 shares; and Alexander Graham Bell, 10 shares. Bell became the company's "electrician" at a salary of \$3,000/year and Watson was put in charge of research and manufacturing (3:104).

The Bell Company continued to grow until in 1879 the company underwent a change in command. A group of Boston financiers, backing the Bell Company, accused Gardiner Hubbard of financial irresponsibility and caused his being replaced by William H. Forbes as president of the company. Due to Hubbard's replacement and differences with Forbes, Bell resigned from the company in 1880. Alexander and Mabel Bell sold their stock in the Bell Company and entered millionaire status, but were never to regain control of the telephone (3:104).

The battle for control of the Bell Company was far from over. A financial power struggle took place in 1880 between telegraph supporters, led by Clarence Mackay vs J. P. Morgan and his banking syndicate. Five years later, the struggle ended with J. P. Morgan's domination of the Bell Company (3:104).

The Evolution of Government Regulation and Control

The company entered the twentieth century with a new name and new leadership. The Bell Company was renamed the American Telephone and Telegraph Company (AT&T) and J. P. Morgan appointed Theodore Vail AT&T's first president. Vail saw a great future for the telephone and for AT&T. He believed the company's strength

was in "universality;" i.e., superior service via total system control. Having some government experience, he also believed "public services are best supplied by a single source" (3:113). Having these perceptions of telephone service and a market where AT&T provided service to 3,132,000 customers (while independent telephone companies, non-AT&T companies, provided service to 2,987,000 customers), Vail and J. P. Morgan began acquiring independent telephone companies. Takeovers were generally made possible by Morgan's cutting off credit and money to the independent (via his banking syndicate) and AT&T making an offer to absorb the company into the AT&T system by acquiring its stock. By 1911, AT&T had acquired so many independent companies that Vail reorganized AT&T into regional management and local exchange companies (3:113).

J. P. Morgan was not content with telephones alone, however. In 1909, AT&T started a move to acquire Western Union (WU) by buying 300,000 shares of WU stock above market price. By 1911, AT&T had control of WU (3:113).

With both independent telephone service and WU falling to AT&T's control, the remaining independent telephone companies (TELCOs) protested to the Department of Justice (DOJ) that AT&T had violated antitrust laws. After reviewing the situation, the DOJ advised AT&T in January 1913 that it considered some of the planned acquisitions of independent TELCOs to be in violation of the Sherman Antitrust Act. During that same month, the Interstate Commerce Commission (ICC) initiated investigations to determine if AT&T was attempting to monopolize communications within the United States (3:114).

Theodore Vail could see the handwriting on the wall; he could continue his route towards monopoly and fight or he could compromise. His decision was to compromise. In a 19 December 1913 letter from AT&T Vice President Nathan C. Kingsbury to the Attorney General, AT&T stated:

AT&T and its associated companies, wishing to put their affairs beyond criticism and in compliance with your suggestions, formulated, as a result of a number of interviews between us during the last 60 days, and agreed to three separate actions: first, to dispose of its holding in Western Union stock in such a way that the control and management of Western Union will be entirely independent; second, to purchase no more independent telephone companies except with the approval of the Interstate Commerce Commission; and third, to make arrangements with all other telephone companies under which their subscribers may secure toll service over the lines of the companies in the Bell System (3:114).

The Kingsbury Commitment, as this agreement came later to be known, ended AT&T's predatory strategy of becoming the national telephone and telegraph monopoly. It also checked the government's pursuit of litigation against AT&T regarding the TELCOs it had acquired up until the Kingsbury Commitment; furthermore, it permitted AT&T to acquire additional independent TELCOs if approved by the ICC. Thus, while AT&T lost the opportunity to grow into a total monopoly, its organization at that time was secure with some future growth protected by government sanction (3:114).

Government regulation remained constant until June 1934 when Congress passed the Telecommunications Act of 1934. This act was the first comprehensive legislation governing national telephone service. The purpose of the act was to "regulate interstate and foreign commerce in communication by wire and radio so as to make available to all people of the United States a rapid efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges. . . ." (13:1). To accomplish this, the act established the Federal Communications Commission (FCC); recognized intra-state telephone service regulation by state commissions; required common carriers to provide service in accordance with FCC approved rates and procedures; and required common carriers to file tariffs. Additionally, the act made mergers and takeovers, for purposes of lessening competition, illegal. If, however, the FCC finds a merger to be in the public interest and so certifies, "there upon any Act or Acts of Congress making the proposed transaction unlawful shall not apply" (13:221). Here again is a reaffirmation that an AT&T merger/takeover, approved by the FCC, is government sanctioned and thus lawful.

The newly formed FCC was serious about its purpose, however, and began a 3 year, 2 million dollar investigation centering on the issue of AT&T as a natural monopoly versus opening telecommunications up to the marketplace (5:2).

AT&T again found itself at odds with the DOJ in 1949. The DOJ filed an antitrust suit alleging that AT&T was "freezing out rival telephone equipment manufacturers from selling their equipment" (4:51). The litigation dragged on for 7 years and resulted in a consent-decree being signed in 1956 between AT&T and the DOJ. The agreement specified that Western Electric would be retained by AT&T; Western Electric would limit (except for defense work) its products to common carrier telephone equipment (excluding high fidelity and data processing equipment); the Bell System would engage in only common carrier communications; and that AT&T would "insure that patent applicants would retain their rights and royalties for telephone inventions" (5:2). "While leaving AT&T intact, the agreement required Bell to stick to the

regulated telephone business and license its technology to competitors. The effect was to shut AT&T out of new unregulated growth areas such as data processing and other telecommunication advances of the past two decades" (4:51).

Once again, AT&T's future might have appeared to be secure but that was not to be the case. In 1966, the FCC began evaluating the linkage between telecommunications and computer technology. The FCC's resulting "Computer Inquiry I" decision reinforced the 1956 Consent Decree in keeping AT&T out of computer technology. The FCC stated that:

. . .communications that used computer-like techniques as incidental elements of the transmission of information over common carrier facilities would remain the identity of a regulated common carrier service. Conversely . . . services that are primarily data processing oriented must be considered 'a maximum separated' service and can be offered only by non-regulated companies or the common carriers through a separated subsidiary (5:3).

1968 found the FCC dealing the first of several devastating blows to AT&T. In a decision which would become known as the "Carterfone Decision," the FCC ruled that carriers and customers could interconnect into the Bell System Network providing no damage was done to the network. This decision opened the door for long distance companies and specialized common carriers to interconnect facilities between major cities via the Bell Network; and that's exactly what happened. In 1969, MCI Communications built a long distance telephone service microwave network from Chicago, Illinois, to St Louis, Missouri. MCI offered this long distance, which was delivered to local customers by patching into the local Bell Network, at rates lower than AT&T's. "It was the first long-distance competition for Bell in 60 years and demonstrated that newer technology could challenge AT&T's lock on interstate service" (4:51). AT&T's long distance monopoly was completely finished, however when in 1981 the FCC "allowed unlimited resale and sharing of all interstate telephone service, including Bell's wide-area telephone service or WATS. This allowed anyone to buy long distance service and re-sell it" (4:52).

The Computer I Decision sought to draw the line of regulated service versus unregulated service by defining the difference in terms of the kind of service being delivered to the customer and the extent and nature of computer technology used relative to that service. The technology of the 1970s, however, was blurring the Computer Inquiry I Decision such that the defined distinction could no longer be made. The FCC, therefore, revisited the relationship between telecommunications and data processing (5:4).

In 1980, the FCC produced a Final Decision to the Computer Inquiry which established a demarcation between two basic categories, defined as basic and enhanced service. Basic service is described as a common carrier offering of transmission capacity for the movement of information between two or more points. . . . Enhanced service is defined as a transmission offering over common carrier facilities which employs computer processing applications that act on the format, content, code, protocol or similar aspects of the subscribers transmitted information. Enhanced service provides the subscriber with additional, different, or restructured information involving interactions with stored information (5:4).

AT&T was permitted by the Computer Inquiry II Decision to provide, as a regulated common carrier, only basic service. It could enter the enhanced service market and customer premise telephone equipment market competitively only through a separate subsidiary.

As damaging to AT&T as these FCC rulings were, the coup d'grace was to be the issue of monopoly versus competition which had plagued AT&T since the days of Theodore Vail. In 1974, the DOJ again filed an antitrust suit against AT&T alleging abuse of monopoly. The government accused AT&T of excluding communications equipment and long distance competition by refusing to allow other vendors to interconnect or use their communications facilities. When AT&T did permit such access, they provided inferior facilities. Additionally, the government charged that AT&T priced their long distance services without regard for actual cost; forced subordinate Bell Operating Companies (local telephone companies) to buy Bell equipment without regard for competitive alternatives; and manipulated the FCC to prevent non-AT&T companies from entering the market.

The case dragged on for years. The longer it went on, the more worried AT&T officials became over strides made in other telecommunications areas from which the company was banned by the 1956 Consent Decree. . . . Concern grew, too, over annual moves in Congress to crack down on AT&T's monopoly by rewriting communications law. Beyond all that, AT&T's defense against the Justice Department antitrust suit was going poorly. When U.S. District Court Judge Harold Greene took over the case in 1978, it gradually became clear to Bell officials that Greene could make rulings that would hurt more than divestiture (4:52).

AT&T's court costs for the period 1974-1982 totalled \$300 million, with no end of the case in sight as of that time. All of these pressures came to a head in September 1981, when Greene denied an AT&T request to drop the government suit, saying that the testimony and documentary evidence led him to conclude "that the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time" (4:52). The handwriting being on the wall, AT&T's board of directors voted on 16 December 1981, to consent to a breakup of the company. "It was the best of a series of bad alternatives," said AT&T Board Chairman, Charles Brown (4:52).

On 8 January 1982, AT&T and the DOJ executed a consent decree to modify the 1956 Final Judgment. The modified final judgment (MFJ) provided that as of 1 January 1984:

- a) AT&T would relinquish control of its 22 local operating (telephone) companies. Seven independent regional holding companies (RHC) would be formed under which the (formerly Bell) local telephone companies (for that region) would be organized.
- b) The RHC would retain the Bell name and local service monopoly (subject to state commission regulation).
- c) Long distance service would remain regulated, but subject to competition among common carriers.
- d) AT&T would gain access into new and unregulated data processing and computer markets.
- e) AT&T would retain Western Electric and Bell Labs.

Of AT&T's divestiture of the local telephone companies and organizational breakup, Chairman Brown commented, "I'm not sure when the confusion will clear up, and I'm not sure the benefits will ever emerge" (4:52). Mark Luftig of Solomon Brothers Investment Bank stated, "It's like taking the Queen Mary into the middle of the East River and trying to turn on a dime" (4:52). Notwithstanding, industry's view of these changes "the event (divestiture) and the cutthroat competition it has already inspired will feed a communications revolution that has barely begun to touch most Americans" (4:54).

Thus far we have discussed at length the rise of AT&T and its breakup as well as the involvement of the Federal Government over the years in regulating interstate telecommunications. The picture would not be complete, however, without an understanding of the state government's involvement in regulating intra-state telecommunications.

Before 1900, most utility companies, exclusive of steam railroads, were local enterprises. Taking account of the local scope of public utility operations, the municipal authorities, who did not trust the state legislatures and their large complements of rural members, demanded and were given authority to regulate local utility enterprises (2:49).

Local control proved less than effective, however. Municipalities found that in an era of rapidly changing technology there was a severe lack of technical competency at the local level to regulate the utility companies. Additionally, municipal regulatory positions soon became subject to local politics, bribery, and corruption. "When the shortcomings of local regulation were evident and when the electric and telephone companies ceased to be local enterprises, state commissions began to take the place of local authorities in utility regulation" (2:49). Today, across the United States, public service commissions are generally devoted exclusively to utility regulation. In nearly all states, they are independent of other branches of government; only the courts can review their decisions.

Commissions control the entrance of new companies and determine the service area of each firm. Commissions exercise this power through the issuance of certificates of convenience and necessity. Lacking one of the certificates, which is about the same thing as a municipal franchise, a company does not have a right to perform utility service (2:76).

The certificate of convenience/franchise

also grants the use of public property to its holder . . . when a company receives the right to use public property, it usually is compelled to accept some obligations about the performance of service. These obligations, which are the regulatory provisions of the franchise, concern such matters as the quality of service, future extensions of service, selling prices (even specific maximum prices), the price at which the local government can buy the private plant, and compensation for the use of public property (2:49).

Following award of a franchise to a company, the utility commission commences regulation and oversight. The utility commission combines the functions of legislator, administrator, and judge.

When a commission prescribes certain rules of conduct for utility companies, it is legislating. . . . The administrative and judicial functions stand out even more prominently than the legislative function. Investigating and prosecuting the companies under their

control, commissions perform important administrative functions. Holding hearings, examining evidence and making decisions, they are judges of utility company conduct (1:75).

Much of the regulatory control of the state commissions remained unaffected by the divestiture of AT&T. Those telephone companies which were providing service in the franchise area continued to do so with only a change of corporate leadership and internal organizational structure. Of some significance on the state commissions, however, were the FCC's actions in deregulation; i.e., customer premise telephone equipment. By opening such equipment up to the competitive market nationally, the state commissions no longer needed to regulate associated pricing or service performance.

Thus, Alexander Graham Bell's concept for a harmonic telegraph spawned a communication technological marvel surpassed only by the enterprises and regulatory bodies which evolved to exploit it. The Bell System grew from a fledgling company in the early 1900s to a corporate giant owning more than "a trillion miles of circuitry with annual revenues representing about 2 percent of the U.S. Gross National Product (GNP)," employing over one million people, and reporting to over three million stockholders (10:2). Indeed, AT&T's control of the market was so great that after some 75 years of service and government regulation, the courts and FCC mandated its breakup to separate its common carrier dominance from its open market activities and thus eliminate any advantage it might have via regulated service subsidiaries.

To oversee telecommunications service, the FCC was formed and regulated interstate communications as it also sought to minimize antitrust situations and monopolistic pressures. Likewise, state governments sought to control intra-state telecommunications by forming public utility commissions and giving them regulatory authority over utility enterprises.

The role of telecommunication common carriers, the FCC, the state commissions, and even the telephone consumer has changed, however, due to the change in the regulatory environment (i.e., breakup of AT&T; making customer premise telephone equipment subject to the open market, etc).

Indeed, "that confusion does exist among consumers is evident throughout the telecommunications industry as everything but the making of a local telephone call is thrown open in an unregulated competitive scramble" (4:53). This is a new environment which all must adapt to if the exemplary telephone service we have taken for granted for so many years is to continue.

Chapter Three

THE AIR FORCE AND REGULATED TELEPHONE SERVICE

As discussed, U.S. telephone service for much of the twentieth century was a government sanctioned and regulated monopoly. Even in those pockets of the country where independent telephone companies "held on," they too were a government sanctioned monopoly of sorts in that they were the only franchised telephone company offering telephone service in the area and regulated by the state's public utility commission. Therefore, in order for the consumer to subscribe to telephone service, he had to be prepared to do business with "a monopoly" and trust that government regulation and oversight would protect the subscriber from the monopoly. This is exactly what the Department of Defense did. It acted as any other telephone consumer and acquired telephone service from the local franchised carrier.

Before getting into the policies and procedures developed to acquire these services, let's first examine what was actually being acquired. All Air Force installations order local service (i.e., the right and ability to communicate, via the local telephone/exchange company, with other telephone subscribers within the local exchange) and direct dial long distance service (i.e., the right and ability to communicate over long distances with subscribers outside the exchange area by connecting, via the local telephone company, with a long distance carrier). Ordering local and long distance service will not, however, permit the making of a telephone call. To make the call on an Air Force Installation, or similar "post-campus environment," you need a telephone instrument, wiring (to connect the instrument to the telephone cable), telephone black cable (to transport the population of calls to a local telephone switch), and a telephone switch (to direct the call to the proper destination, i.e., elsewhere on base or to the local telephone company downtown). In totality, these items and services will provide what is routinely considered "normal telephone service." Indeed by ordering these items service was even maintained as maintenance charges were "built in" to the service rates for the base rate area. There were fringe benefits to such service. As the "telephone monopolies" were service oriented not profit motivated, a wealth of technical and engineering support was usually available.

This system may appear complicated, but in reality, it was very simple. If an Air Force installation needed service or changes in service, the base communications officer simply contacted the local telephone company for that area (regardless of it being a Bell Company or independent) and the telephone company took care of it. The telephone company determined the hardware needed, installation required, and made the service work. The public utility commission and FCC determined how much the subscriber would pay; so all that was really left was for the base to sit back, accept the service, and pay the monthly phone bill. This is somewhat of a simplification--but not by much. The Air force, as with most telephone subscribers relied totally on the telephone companies for technical, engineering, and maintenance support to provide and maintain base telephone communications.

This system worked well! The telephone companies understood that their franchised responsibility was to provide good service. To do that, they requested tariffs of the public utility commissions (PUC) to ensure telephone rates covered necessary costs plus reasonable rates of return. Thus, telephone companies providing service needed to only be concerned with servicing their customers well--costs and profit were guaranteed!. From a consumer's vantage point, all of this was transparent! The consumer didn't need to know the technical or regulatory details--he only needed his telephone to work and it did!

Indeed, for the Air Force to subscribe to such commercial services was consistent with DoD policy "to obtain telephone facilities and services from commercial sources when private enterprise can effectively provide them to meet administrative and operational requirements" (7:34). Such commercial telecommunication services were acquired at over 120 Air Force installations, commonly referred to as leased bases (12:21). Generally, these telecommunication services were procured by the Air Force "from the communication common carrier authorized by the appropriate regulatory body to operate within the service area in which the services were required" (8:22,33). Thus, bases needing telephone services contracted with the only source available in the area; the local telephone company which in most cases was a local Bell Operating Company owned by AT&T.

AIR FORCE MANAGEMENT AND ACQUISITION

How did the Air Force procure and control its telephone service? To manage and acquire leased telecommunications services, Air Force regulations were adopted outlining responsibilities and procedures. For example, AFM 100-22, Management of Base Communications Facilities and Services, specified the kinds of available telephone services and facilities; the conditions under which they could be approved for

local use; policies for providing telephone service; planning for and leasing telephone facilities and service; operations management of leased telephone services; and processing telephone bills.

AFM 100-22, chapter 4, outlined the responsibilities for leased telephone facilities and services. It required MAJCOMS to "provide operational supervision of commercial communications service functions at Air Force bases and installation; provide direction and supervision of personnel in the proper use of procedures prescribed in this manual; and review and approve or disapprove all new base wire communication systems (BWCS) requirements" (7:44). Operations and maintenance commands were required to plan, develop, engineer, and install adequate and up-to-date base cable and telephone systems at bases under their control (7:45). The base communications officer was required to supervise the overall operation and maintenance of all base communications facilities; maintain close liaison and coordinate with local commercial communications companies and base activities to obtain and use commercial telephone services; maintain on-base telephone cable records and maps; issue work orders to the telephone company calling for services under contract; perform leased telephone equipment surveys; educate base personnel in use of local telephone systems; and a host of other items (7:46).

As regulations such as AFM 100-22 provided for the management of leased telecommunications equipment and services, the Armed Services Procurement Regulation (ASPR) prescribed the manner in which they would be acquired. The ASPR specified the communications acquisition policy relative to the DoD as to procure "communications services of a kind offered by common carriers, including equipment and facilities incidental to those services, from common carriers in accordance with tariff provisions, and at tariff rates established with the Federal Communications Commission (FCC) or with other appropriate governmental regulatory bodies unless cost or operational requirements dictate otherwise" (8:22:31). As such, rates and charges provided for by governmental approved tariffs were considered to be set by regulation. Accordingly, these common carrier rates for equipment and services were to be accepted by DoD and that common carriers not be required to justify/substantiate the reasonableness of such tariffs to the contracting officer as usually required in all other procurements (8:22:34).

In addition to this simplified "pricing" approach to tariffed telephone services (i.e., acceptance of tariffed prices), the ASPR established a simplified contracting procedure called a "communication service authorization" (CSA) to contract for telecommunication service. Under this approach, a general

agreement representing a "written instrument of understanding executed between a procuring activity and a communications contractor, which sets forth the negotiated contract clauses and other matters which shall be applicable to future procurements," is established (8:22:30).

When services are necessary, a CSA (DD Form 428) is issued by the contracting officer ordering the specific services/equipment needed; setting either a fixed or ceiling price; obligating funds; and invoking the provisions of the general agreement. If a ceiling price is set, the base communications officer is normally authorized to order services from the common carrier via work orders up to the CSA ceiling price and without contracting officer involvement (8:22:36). The CSA and the general agreement together constitute the contract.

Three elements, AT&T standard industry practice, Air Force regulations/manuals, and the ASPR prescribed how the Air Force would identify its needs, acquire service to fulfill those needs, and manage Air Force operations to ensure the needs continued to be met. In reality, however, the Air Force remained no different than any other large telephone subscriber. Our regulations simply served to prescribe the mechanisms by which we would interface with common carriers. At best the DoD was treated as a preferred customer by AT&T and other telephone companies and as just a major user by the FCC and state commissions.

As stated previously, however, this system worked well. Leased bases needing telephone service, but lacking telephone technical expertise, would rely on their "one-stop telephone shop," the telephone company (usually AT&T), to translate their telephone/telecommunication problem into engineering drawings, plans, and fixes. This resulted in telephone company designated hardware, installation, operation, and maintenance tailored to meet the base communication officer's service need and thus "keeping the wing commander off his back." AT&T (and independent TELCOs) service was outstanding because they were service-motivated versus profit motivated; cost coverage and profit was guaranteed by the government regulated tariffs. The only open item was how to contractually provide for the service and the ASPR addressed that.

To implement the ASPR and procure base telecommunications needs, contracting was centralized at AFCC's Continental Communications Division, Griffiss AFB, New York, where a small staff of contracting personnel supported leased telephone service requirements throughout the CONUS. Backlogs in awarding and administering CSAs were not uncommon. Operationally, however, these backlogs did not present a problem. At the local level, the TELCO knew their price was fixed by regulation and that they were the only franchised source, thus they proceeded with the

work knowing the CSA "contract" could go to no other source. This manner of doing business bred dependence on the telephone company as there truly was no other contractor authorized or available to meet the consumer's needs. As such it was the standard commercial practice of all users to be so dependent for over 75 years. This dependence permitted AT&T to create its system of universal service that provided the world's best communication network. This system stopped working, however, on 1 January 1984.

AIR FORCE TELECOMMUNICATIONS RESPONSIBILITIES AND PROBLEMS

The deregulation of the telecommunication industry and the divestiture of AT&T have drastically altered the nature of telecommunications for the average consumer. From the days of "one-stop-telephone-service-shopping," the telephone consumer must today "arrange for any additional on-premises wiring that may be necessary; contact the local telephone company to obtain interconnection service; select the interstate carrier desired for routing their long distance calls; find a business willing and able to determine why their telephone isn't working and to make the necessary repairs; pay separate bills for each of these services; and shop around for telephones and other communications terminals" (1:103). The Air Force, as with most "post-campus" telephone customers, finds itself in a much more complex situation. Having to meet the telephone needs of a small community necessitates managing a telephone system versus a single home phone. In the wake of deregulation and divestiture of AT&T (with the separation of AT&T responsibilities) who does the base communications officer go to regarding telephone instruments, wiring, switching, cabling, local service, and long distance problems? What prices, regulated versus deregulated should he pay? Who can he turn to for engineering/technical support? What services remain regulated and subject to sole source versus competitive procurements? These issues are the proverbial tip of the iceberg the Air Force must deal with.

Today, Air Force telecommunication leased bases generally receive telephone service from three sources: Equipment is furnished by AT&T Information Systems (ATTIS) on a de-tariffed basis; dial tone service is provided by the local TELCO under PUC tariff; and direct dial long distance is obtained from AT&T Communications under FCC tariff (NOTE: This may vary somewhat depending on specific service at a given base.) (11:2). This translates into Air Force communications and acquisition personnel having to work with three times as many contractors just to operate and maintain the existing base telecommunications system. D&D has forced Air Force personnel to take on a full range of new "telephone consumer responsibilities" as follows:

- a) Identification of need (or problem).
- b) Documentation of need (purchase descriptions, statements of work, specifications, etc.).
- c) Ordering service via Air Force internal review and contracting processes.
- d) Scheduling delivery of service.
- e) Verifying adequacy of service.
- f) Pursuing corrective actions as necessary.
- g) Authorizing payments for service delivered.

(11:3)

These tasks are not easily met for just as D&D has prompted new telecommunication consumer responsibilities, so to are there new problems.

Just as increasing numbers of telecommunication contractors on base make the base communication officer's job more difficult, so does it make the job of each contractor more difficult. These contractors "must interface, operate, and coordinate their activities with the base and each other if the leased telecom mission is to be accomplished (11:3). AT&T's divestiture has broken". . . a century of tradition wherein detailed coordination was inherent, mandated by the powerful monopolist" (1:107).

Contractor cooperative spirit is impacted in that they are no longer service-motivated as AT&T was prior to D&D. In today's deregulated and competitive era, most contractors are profit-motivated. "That means minimizing their exposure and risk and maximizing profit opportunities. This is translated into a day-to-day work environment in which cooperation ends where unacceptable costs begin" (11:3). "The Bell Operating Companies (Bell local telephone companies), independents, and interexchange carriers . . . will be cut to the bone as competition becomes more intense Degradation in quality an reliability seems inevitable" (1:107).

To satisfy mission requirements, leased-base telecom managers have established "working relationships" with local telecom contractor representatives.

Via this local relationship, our people request, demand, twist arms, compromise, and do whatever it takes to get the job done. . . . Problems crop up when there is a change in technicians, base requests/issues fall outside the local TELCO technician's authority, or if there is a change in contractor policy which

restricts the local technicians ability/authority to respond (11:3).

These local working relationships between base communications personnel and telecom contractors also serve to circumvent the involvement of centralized contracting authority.

Having an operational responsibility, the base communication officer is concerned with getting/maintaining telecom service now. To this end, the base still views the contracting officer as a "slow paper-pusher," necessary only to legally document a funding transaction/service order. The base does not view the contracting officer as an enforcer, schooled and trained in the recourses the government can take to force contract compliance. As such, the bases are pretty much operating on their own based on working relationships. The fact is that these working relationships cannot guarantee contractor performance and they have the potential for compromising the Government's rights in future situations if base personnel act contrary to the contract (11:5).

As discussed before, Air Force personnel must now assume responsibility for identifying telecom needs and associated specifications and statements of work. The determination of requirements today is not as easy as it once was. Pre-D&D, the base communications officer simply turned AT&T on to provide whatever was necessary to satisfy the base. D&D formally terminated that relationship and all AT&T technical assistance and support thereto. Aside from this formal termination, the bases still get minimal levels of technical assistance, based on the aforementioned working relationships. ". . . By having AT&T do our technical work, we continue to rely on them without any method of check and balance" (11:7).

Lt Col Jerome Landry summarized this predicament in his paper on AT&T's breakup, stating:

DoD users must now define their needs with specific technical detail and engineering specifications; must usually specify circuit routing and interfaces; and must know exactly what they want before they order it. Unlike the pre-divestiture world, today if you order it wrong, you will get it wrong. Or perhaps worse, if DoD users do not develop the requisite commercial communications engineering expertise--to at least a level comparable to that of the industrial sector--aggressive marketing teams will convince layman users that gold plated systems are the only choice. The problem is that while DoD has many communications engineers and technicians, few have any expertise in commercial communications engineering. This sort of

talent has not been needed before--and it is not readily available now (10:18).

Lack of technical expertise at base level is also impacting long-term planning. Leased bases do not have the base cable records, line assignment data, and other system records necessary to perform configuration management of the base telecom system nor plan for future growth of the system. This lack of technical expertise also impacts quality assurance evaluations (QAE); the inspection of contractor performance measured against contract requirements. Leased telecom personnel are not Teutonically qualified at base level to verify contractor work versus contract requirements nor do they have the equipment to conduct such tests and inspections (11:7).

Another issue relative to leased telecom and contracting are the contracts themselves--the CSAs. These contracts are carryovers from pre-D&D. Many of them go so far back in time that it is difficult to determine when they actually started. The CSA was an order for service. . . . Many conditions of service were omitted from the contract since the Government-controlled tariff governed all rights and obligations between the parties. Now that equipment is de-tariffed and all telephone contractors (including TELCOs) are seeking to minimize risk and maximize profit, contract terms and conditions are a major point of dispute. Without tariffs governing both parties, the contracts must be used to determine the rights and obligations between the parties. Without definitive terms and conditions, these contracts are open to interpretation. Different interpretations often lead to disagreement and confrontation. An example of this is AT&T's policy on technology migration. Under the terms of our contract, AT&T must provide specific pieces of telephone equipment. In several instances, AT&T has discontinued equipment items. This leaves the base communications officer the decision of not satisfying the equipment need or paying a higher price for the new technically superior item. The Government would maintain it has a right to order the old item at the cheaper price and that AT&T has the obligation to provide the old item if so ordered. AT&T maintains it is free to make business decisions and offer service consistent with those business decisions. Who is right? Negotiation and litigation will probably decide that, but the point is that poorly written contracts increase the need for interpretation. The greater the need for interpretation, the greater the contractual risk for the Government as contract ambiguities are usually found in favor of the contractor during litigation. This problem is compounded when Government personnel, other than the contracting officer, make

those interpretations via working relationships. The bottom line is we're trying to function in the post-D&D era using contracts written in the pre-D&D era. They don't fit (11:6).

Today, local telephone company service and direct dial long distance service remain government regulated and tariff controlled. The documents which prescribe the rights and obligations between the parties are the contract and the tariff. As telephone service consumers, we have visibility into but lack control over tariff changes. Such changes are controlled by the FCC and public utility commissions. The Government's rights and obligations to service could be legislatively changed by these regulatory bodies. It is of critical importance, therefore, that the Air Force know when its contractors are seeking tariff changes; evaluate such proposed changes thoroughly; and that we aggressively present our position to the FCC and state commissions, as appropriate, during the hearing process (11.6).

D&D brought competition into a telecommunication world that was almost completely "sole source" up to that point. "For years, the majority of the Government and commercial customers had a highly responsible and responsive source of supply--AT&T. The contractor understood our needs, systems, and operations. He made sure we had the telecommunications we needed to achieve our mission" (6:5). As such, there remains some resistance to embrace competition versus sticking with a proven and reliable AT&T. Another reason for sticking with the incumbent is the ability to use the existing contract versus having to competitively award a new contract. New contracts require a complete understanding of needs, specifications and require new solicitations, evaluations, audits, contract preparations, and reviews. Above all, new contracts take more time; and the communication community is accustomed to immediate AT&T service response not the contracting officer's acquisition lead time.

SUMMARY

Base-level telecommunication service was successful because AT&T's concept of universal telephone network service via its control of the network was successful. This service, and AT&T's control, although successful, contained inherent pitfalls. It required system control by AT&T, discouraged educated consumerism, bred complete reliance on the monopoly and implanted in consumers an absurdity for telecommunication competition. In such an environment, the FCC's deregulation of the telecommunication industry and judiciary's divestiture of AT&T caused traumatic change and caught industry and consumers totally unprepared. The Air Force is still trying to cope with these changes. It has cancelled the AFM 100 series regulations and instituted an

AFR 700 series giving directions on "information systems." All the services are moving towards competitive replacement of base-level telecommunication systems and services despite budget cutbacks and Congressional criticism of such programs. To succeed in these programs and in the era of D&D, comprehensive guidance and authority must be developed and prescribed on how to deal with this new open-market and competitive environment. Only through such decisive policy and action can the vacuum of control created by AT&T's breakup be corrected and open-market opportunities be exploited. In short, the Air Force must cease being a telecommunications "passenger" and develop and use the tools necessary to plan, acquire, and control its service requirements to ensure telecommunication resources are ready to meet the mission requirements of command and control.

Chapter Four

REVISING THE FEDERAL ACQUISITION REGULATION (FAR) FOR TELECOMMUNICATIONS ACQUISITION

The telephone began as a mechanical invention that mushroomed into a system of universal service dominated by a single source of supply for over 75 years. This "single source" system bred consumer reliance and dependence in exchange for superior telecommunications service. All was well and good until the "single source" system was discarded by the telecommunication industry's deregulation and divestiture of AT&T, the "single source." The market place has changed; the players have changed. How should the Air force meet its base telephone/telecommunication mission in light of these changes? How should the Air Force cope with such problems as multiple vendors, regulated versus unregulated service; scarce technical expertise, changing tariffs, ambiguous contracts, etc. A partial answer is to set new acquisition guidelines for the new telecommunications acquisition environment in which the Air Force and the DoD find themselves.

The Federal Acquisition Regulation (FAR), part 37, sets general policy for the acquisition of services. The FAR defines such categories of services as nonpersonal, personal, and consulting, but does not go into any great detail on the acquisition of specialized services, i.e., engineering, mortuary, education, or laundry services. Such specific policy is contained in the DoD FAR Supplement. Subpart 37.74 of this supplement specifies policy and procedures for acquiring communication services but is little more than a reprint of its acquisition regulation predecessors, the Defense Acquisition Regulation (DAR) and the Armed Services Procurement Regulation (ASPR). The supplement mostly applies to acquiring government regulated telecommunication services and does not address the industry's currently competitive and fragmented environment. The DoD FAR Supplement must be revised to prescribe policies and responsibilities for today's telecommunication's service acquisitions. To continue using the existing supplement is to play game "X" using game "Y's" rules; to do business in a competitive marketplace where it's "buyer beware" using policies developed for government controlled monopolies which now only partially provide our telecommunication services.

FAR REVISIONS AND RATIONALE

DoD FAR Supplement, subpart 37.74 must be revised to deal with the issues discussed in chapter three as follows:

- a) Categories and sources of today's telecommunications services.
- b) Competition versus less than full and open competition.
- c) Contract ambiguities.
- d) Lack of technical expertise.
- e) Multiple contractors.
- f) Quality assurance.
- g) Informal working relationships.
- h) Tariff changes.
- i) Protect the Government's rights under the contract.

Policy and procedures to deal with these issues have been formulated and are presented in Appendix A as a draft revision of the DoD FAR Supplement. Changes between the existing and proposed supplements are as follows:

a) Section 37.7401. General policy regarding telecommunication service acquisition is specified. Two general types of service are prescribed for acquisition--government regulated common carrier service and competitive service.

b) Section 37.7402. Telecommunication industry definitions are expanded.

c) Section 37.7404. The policy regarding "Who may acquire telecommunication service" is unchanged. Clarification of the contracting officer's (CO) authority and that of his designated representative is added to reinforce the CO's role in telecommunications acquisition; limit the CO's representative to within contract scope activities (consistent with government contract law); and direct that the CO be notified of deficient contractor performance. Such policy is necessary to protect the government's rights and preempt "freewheeling working relationships" from impacting the mission regardless of their good intentions.

d) Section 37.7405. Telecommunication industry deregulation and AT&T divestiture (D&D) created many different categories of

service which may overlap. This section discusses such categories of service and their general method of acquisition. Such information is necessary to determine the applicability of competition; prescribe definite contract terms and conditions; determine the necessity for single versus multiple contracts (thus single or multiple vendors); and to determine the applicability of tariffs.

e) Section 37.7406. Prior to D&D, a specialized sole source TELCO contract dominated telecommunication acquisition. This section revises that to specify that non-regulated service contracts shall be written and awarded consistent with general service contract requirements (FAR, part 16). A special contract arrangement, similar to its pre-D&D predecessor, the Communication Service Authorization (CSA), shall be used for regulated services. For both contract types, specific terms, conditions, and aggressive contract administration is required. Such policy contributes to eliminating contract ambiguities, provides for managing multiple vendors, reduces the need to rely on informal government/contractor relationships to assure performance and overall provides the basis for protecting the Government's rights.

f) Section 37-7407. This expanded section specifies that the CO shall verify the availability of funds prior to authorizing service. Additionally, funds must be obligated when service is ordered. This policy protects the Government from unauthorized obligations and is consistent with the Anti-Deficiency Act. Furthermore, it serves as a check on informal relationships seeking to get things done without regard for availability of funds.

g) Section 37-7408. Prior to D&D, most telecommunication contracts/orders were "sole sourced" to the TELCO. This section prescribes competition as the rule with exceptions made only with adequate justification. Provision is made, however, for the continued use and modification of existing CSAs until their expiration. This policy supports competition.

h) Section 37.7410. Contract expiration is essential to plan for continued service, competition, funding, etc. Existing telecommunication contracts generally do not include contract expirations. This section requires telecommunication contracts/orders to explicitly state the performance period. This requirement supports competition, eliminates a currently major ambiguity and is essential in protecting the Government's rights.

i) Section 37.7411. Informal working relationships with the TELCO generally included little quality assurance oversight or inspection. In an era of "buyer beware" this section requires a competent government overseer and a plan for conducting such

oversight. The requiring activity is directed to report contractor nonperformance to the CO. This section supports managing multiple vendors, compensating for minimal technical expertise, provides the basis for aggressive quality assurance and prevents informal working arrangements from negatively effecting contract requirements.

h) Section 37.7412. The government seldom prepared telecommunication specifications prior to D&D. It ordered what the TELCO suggested for the service the government wanted. Such practice today would be acquisition suicide. This section mandates that specs be written to support competition. Should technical expertise be unavailable, special contracting procedures are authorized to competitively acquire technical proposals or contract-out for firm specifications. This section supports competition, compensates for inadequate technical expertise, provides for firm specs making multiple vendors more manageable, enhances quality assurance, and contributes to eliminating major technical ambiguities.

k) Section 37.7413. Government (FCC/PUC) regulation may negatively impact DoD contracts by requiring actions contrary to the contract. This section requires the services to set up a system for reviewing all proposed tariffs, assessing their impact on DoD installations, and presenting the DoD's concerns to the appropriate regulatory body prior to tariff approval. This policy is critical in maintaining the integrity of the Government's contract, continuing the necessary services, and sustaining the Government's contractual rights.

RECOMMENDATIONS

I recommend revising the DoD FAR Supplement, subpart 37.74, for acquiring telecommunication services and that the draft at Appendix A be used as a framework for such revision. It is only through such revision that the acquisition community will have the proper guidance to operate in today's telecommunication market environment and acquire the right services at the right time and place to fulfill mission needs. Without such changes, deficiencies in technical planning, acquisition planning, and the solicitation, award, and administration of contracts will continue. Such poor acquisition translates into potentially poor service. In an era of scarce fiscal resources and high threats, our communications, especially our routine daily telecommunication services, must be efficient and effective or result in squandered dollars and compromised command and control. The stakes are too high to allow this to happen. I recommend that appendix A be submitted to the DoD FAR Council for approval.

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APPENDIX

APPENDIX A

DRAFT DOD FAR SUPPLEMENT 37.74

TELECOMMUNICATION SERVICES

30/

PART 37--SERVICE CONTRACTING
SUBPART 37.74--COMMUNICATION SERVICES

37.7400 Scope. This subpart prescribes policy and procedures to be used in the acquisition of government regulated and competitively available telecommunication services within the United States. It may be used as a guide for similar acquisitions outside the United States.

37.7401 General Policy. In accordance with instructions contained in Department of Defense directives and implementing departmental regulations concerning the operation of commercial and industrial type activities, and specifically with those concerning the sources for telecommunications services, the Department of Defense generally acquires two categories of telecommunication services; common carrier services regulated by appropriate governmental bodies and other contractor services competitively available in the open market. Regulated common carrier services, including equipment and facilities incidental to those services, are acquired in accordance with and are subject to tariff provisions and rates approved by the appropriate governmental body. All non-government regulated telecommunication services are acquired in accordance with Part 6.

37.7402 Definitions.

"Appropriate Governmental Regulatory Body" means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating pursuant to state authority. Regulatory bodies whose decisions are not subject to judicial appeal and regulatory bodies which regulate a company owned by the same entity which creates the regulatory body are not "appropriate governmental regulatory bodies" for the purposes of this subpart.

"Common Carriers" means any person, partnership, association, joint-stock company, trust governmental body, or corporation engaged in the business of providing communications services to the general public, normally authorized or franchised by the Federal Communications Commission (FCC) or other appropriate governmental body.

"Customer Premise Equipment" (CPE) means that equipment owned by the telecommunications subscriber and located on his premises which permits interconnection with and communication over the common carriers telecommunication network.

"Foreign Carrier" means any person, partnership, association, joint-stock company, trust, governmental body or corporation not subject to regulation by an appropriate United States governmental regulatory body and not doing business as a citizen of the United States, which provides communications services outside the territorial limits of the United States.

"Franchise" means sole authority granted by an appropriate government regulatory body to a corporation or individual to use public property, render service to the public, and to make charges for such service.

"Local Exchange Carrier" (LEC) is that common carrier possessing the franchise to provide local telephone service within a specific geographically defined exchange area.

"Noncommon Carrier" means any entity other than a common carrier which offers communications facilities, services, or equipment for lease.

"Special Assembly" means the designing, manufacturing, arranging, assembling or wiring of an item or items of equipment to provide service that cannot be provided with equipment normally employed for general use.

"Special Construction" means the furnishing of some special service or facility by a common carrier incident to the performance of the basic service. Under a given tariff, this may include (1) moving or relocating specified equipment, (2) providing temporary facilities, (3) expediting provision of facilities, or (4) providing channel facilities which must be specially constructed to meet the requirements of the Government. The procurement of "special construction," as that term is used in the communication industry, shall be governed by the provisions of this part and shall not ordinarily be subject to the provisions of FAR 36.

"Telecommunications Services" means those services provided by all types of systems and facilities connected therewith that employ electric or electromagnetic signals to transmit information between two or more points by means of radio, wire, cable, satellite, and other media. Included are telephone, telegraph, teletypewriter, remote writing, remote display, data transmission, facsimile and television transmission services, as well as terminal devices, switches, private branch exchanges, transmission facilities, and other components of the systems that supply these services. Also included are all local, post, camp, station, or long distance services, as well as all fixed or mobile facilities that are interconnected to systems providing these types of services.

"Telephone Company" (TELCO) is synonymous with "local exchange company" (LEC).

37.7403 Special Telecommunication Organizations:

37.7403-1 Regulatory Bodies.

(a) The Federal Communications Commission (FCC) and other appropriate governmental regulatory bodies generally publish rules and regulations governing the operations of common carriers and prescribe accounting principles to be employed in the establishment of rates. Notwithstanding other provisions of this Supplement, the regulations, practices, and decisions of the FCC and other appropriate governmental regulatory bodies concerning rates, cost principles, and accounting practices shall

be recognized in the procurement of communications services from common carriers. With respect to those issues concerning common carrier services (1) on which the appropriate governmental regulatory body has not expressed itself, (2) over which the appropriate governmental regulatory body has declined jurisdiction, or (3) as to which there is no appropriate governmental regulatory body to make a decision, specific provisions should be made in the contract for adoption of FCC-approved practices or the generally accepted practices of the industry.

(b) Since the Department of Defense frequently requires unusual or special communications services advancing the "state of the art," Defense Department activities frequently move into areas which the cognizant governmental regulatory bodies have not explored. In such situations, the Defense Department frequently is the sole or primary user of many of a given common carrier's offerings. In addition, because of the large volume or normal services which the Defense Department requires, the day-to-day decisions of governmental regulatory bodies may have a vast dollar impact upon it. It is not Defense Department policy to duplicate the efforts of appropriate governmental regulatory bodies or to act as a second regulatory body. On the other hand, the Defense Department's self interest requires that it act as an informed and intelligent consumer, seeing to it that its side of the case is presented to the cognizant bodies and working with the common carriers to ensure that in those areas in which the FCC cannot or will not rule, sound regulatory practices are followed. Every effort should be made to avoid the time and expense of litigation by full and fair disclosure of both the carrier's and the Government's position in advance. Nevertheless, in the event actions short of litigation are not productive or just, reasonable or otherwise lawful rates, or when there is a refusal to provide required services or file appropriate tariffs, legal actions should be initiated and vigorously pursued. All contacts with the regulatory bodies should be through cognizant counsel in accordance with established Departmental and Defense Communications Agency procedures.

(c) Upon receipt of tariff information received in accordance with 52.37-7411, Tariff Information, the contracting officer shall immediately provide copies to the cognizant counsel.

37-7403-2 Foreign Carriers. The acquisition of communication services within or between foreign countries and the acquisition from a foreign carrier of communication services from a foreign country to the United States present problems beyond the scope of this subpart. Frequently, foreign carriers are owned by the government of the country in which they operate, and their methods of doing business are prescribed by the foreign government. In many countries, an international agreement with

the host country prescribes guidelines for how the Defense Department will obtain communication services. In addition, there are frequently severe problems with taxes on communications in foreign countries. In other countries, a corporate subsidiary of a carrier not indigenous to the country (often a U.S. parent) is the sole source for communication services. As a general rule in foreign countries, rates and practices should be spelled out in as much detail as possible in a contractual document. It consistently has been Defense Department policy not to pay discriminatory rates and to pay no more for communication services in a foreign country than does the military of that country. Special problems with communications procurement in foreign countries should be channeled to higher headquarters for resolution with the assistance of State Department representatives as appropriate.

37.7404 Acquisition Authority:

37.7404-1 Who may Acquire Telecommunication Services.

(a) The general authority of the Head of a Contracting Activity contained in FAR 1.601 includes the acquisition of communication services. In addition, the Administrator, General Services Administration, has delegated to the Secretary of Defense under the terms of the Federal Property and Administrative Services Act, as amended, authority to enter into contracts for communication services extending beyond the fiscal year, but not longer than 10 years under the following circumstances:

(1) The Government obtains lower rates, larger discounts, or more favorable conditions of service than those available under a contract for a definite term not extending beyond the current fiscal year; or

(2) nonrecurring or termination charges payable under contracts for a definite term not extending beyond the current fiscal year are eliminated or reduced; or

(3) the carrier refuses to render the desired service except under contract for a definite term extending beyond the current fiscal year.

(b) The Secretary of Defense has delegated the authority to him by the Administrator, GSA, to the Secretaries of the Military Departments and the Director, Defense Communications Agency, who have in turn delegated it to the following (with power of redelegation):

(1) for the Department of the Army: The Commanding General, United States Army Communications Command; and the Commanding General, United States Continental Army Command;

(2) for the Department of the Navy: The Commander, Naval Facilities Engineering Command;

(3) For the Department of the Air Force: The Deputy Chief of Staff, Research Development and Acquisition; and the Director of Contracting and Manufacturing Policy, DCS/RD&A, HQ USAF;

(4) for the Defense Communications Agency: The Chief, Defense Commercial Communications Office;

(5) for the Defense Logistics Agency: for the leasing of local telecommunications facilities and services, Commanders of DLA centers, depots, and DCAS regions; and

(6) for the Defense Nuclear Agency: for contracts not in excess of \$1,000,000, the Commander, Field Command, DNA.

(c) The ten-year limitation of (a) above does not apply to "general contracts" (see 37.7408) but to obligating the Government for a longer period than ten years by orders placed under the general contract.

37.7404-2 Contracting Officer Authority. The contracting officer's authority shall be as specified in FAR 1.601. Individuals designated in writing as representatives of the contracting officer shall interface with contractors in accordance with their delegation and the terms and conditions of the contract. Under no circumstances shall such designated or non-designated government employees direct the contractor or levy requirements outside of the contract scope or contracting officer's delegation. Violations of this policy may be considered a ratification action in accordance with Part 1.670.

37.7405 Telecommunication Service Categories.

37.7405-1 General. Telecommunication services can be categorized in several different ways by (a) the service offering (i.e., local service, long distance, etc); (b) the basis of the offering (i.e., tariff vs nontariff); and (c) the applicability of government regulation. The contracting officer must fully understand these categories and their relationships to adequately plan the acquisition.

37.7405-2 Local Telecommunication Service. Service offered solely by a franchised local exchange company (LEC) or telephone company (TELCO) for the franchised area. Such service is offered in accordance with and subject to tariff provisions and rates approved by the state public utilities commission or other appropriate governmental body.

37.7405-3 Long Distance Service. Long distance service, also referred to as direct dial long distance service, is the transportation of a telephone call. Such service is offered by common carriers who are required to file tariffs but are not regulated by the FCC. As this service is not reserved for any single franchised company, it shall be acquired competitively in accordance with Part 6.

37.7405-4 Basic Service. A common carrier offering of transmission capacity for the movement of information between two or more points. Such service is offered by the TELCO and long distance vendors.

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37.7405-5 Enhanced Service. A transmission offering over common carrier facilities which employs computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscribers transmitted information. Enhanced service provides the subscriber with additional, different, or restructured information involving interactions with stored information. Such service is not government regulated and shall be acquired competitively in accordance with Part 6.

37.7405-6 Tariffed Service. Telecommunication service offered by common carriers who are required to submit their offerings to appropriate government bodies. Service is provided in accordance with the tariffs; the provisions and rates as specified in the tariffs are binding upon all parties. TELCO tariffs are generally reviewed and approved by state public utility commissions. Long distance tariff filings are required by the FCC; however, the commission generally accepts them via forbearance. Tariffed service should be assumed a competitive acquisition until thorough acquisition planning substantiates justification of less than full and open competition.

37.7405-7 Non-Tariffed Service. Telecommunication service for which tariff filings are not required. Such service is not government regulated and shall be acquired in accordance with Part 6.

37.7405-8 Customer Premise Equipment (CPE) Charges. Prior to the FCC's deregulation of CPE, it was customary for telephone service customers to subscribe for such service by leasing necessary telephone equipment; such was the approved tariff pricing structure. Since deregulation, however, CPE is generally non-tariffed and new acquisitions of CPE items shall be treated as equipment acquisitions in lieu of service, providing title to such equipment vests with the government.

37.7406 Types of Contracts.

37.7406-1 Contracts for Non-Government Regulated Service. The type of contract executed for non-Government regulated telecommunication service shall be selected in accordance with subpart 16.1.

37.7406-2 Contracts for Government Regulated Service.

(a) General. The acquisition of government regulated telecommunications services from a franchised local exchange company (LEC)/Telephone Company (TELCO) for any given DoD installation is facilitated by a contractual arrangement which provides a written instrument of understanding between the Department of Defense (DoD) and the LEC/TELCO which sets forth the basis under which future procurements will be entered into as required during the term of the agreement. The Defense Communication Agency (DCA), Defense Commercial Communications Organization (DECCO) shall enter into such contractual

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arrangements on behalf of the DoD with all TELCOs located within the United States unless otherwise negotiated between DECCO and the service's communications acquisition command.

(b) Basic Agreements. The instrument of understanding specified in 37.7406-2(a) above is referred to as a Basic Agreement. Basic Agreements, known as "general contracts" within the communication industry, are widely used to facilitate awards for communication services. Such an instrument is not a contract, but rather represents a written instrument of understanding executed between a procurement activity and a communications LEC/TELCO which sets forth the negotiated contract clauses and other matters which shall be applicable to future procurements entered into between the parties during the term of agreement. The basic agreement together with the orders issued thereunder (see 37.7406-2(c)) represents the contract. There shall be a single contract executed between the Government and the TELCO, composed of the basic agreement and all orders issued for government regulated/TELCO franchised service, per DoD installation. The expiration of such contracts shall occur not later than the tenth anniversary of the issuance of the first order against the basic agreement. Basic agreements shall not be used in any manner to restrict available competition. All basic agreements will be executed in the name of the United States Government.

(c) Orders issued against basic agreements. A DD Form 1155 shall be used to order services under the basic agreement and to modify, cancel, or terminate services. As a general rule, prices should be established prior to authorizing the contractor to begin work. However, when the contractor is allowed to begin work prior to pricing in accordance with this paragraph, an estimated price or ceiling shall be included; and the contractor and the contracting officer shall proceed with definitive pricing as soon as practicable. In addition, an order may be issued which includes a monetary ceiling or series of ceilings for the stated services. This type of order is called a "maximum limit authorization" in the communications industry. This maximum limit authorization also may provide, in addition to the established ceilings, limited authority to designated individuals to issue work orders within the dollar ceilings for specified contract services. The contracting officer shall review the status of work orders quarterly to assure funds have not been overobligated, all work ordered is within the scope of the contract and that LEC/TELCO performance is in accordance with the contract. Each order or modification placed by the contracting officer against the Basic Agreement shall be subject to such reviews, approvals and determinations and findings specified in this supplement as would be applicable if the order were a contract entered into apart from the Basic Agreement.

(1) Orders for Special Assembly and Construction.

(i) General. Orders for special assembly and/or construction shall be issued as an order against the basic

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agreement, specifying separate contract line items and delivery dates/performance periods for the work ordered.

(ii) Orders for special construction may involve the following costs:

(A) contingent liability for utilizing the services for a shorter period of time than the specified minimum to reimburse the contractor for his unamortized nonrecoverable costs and usually expressed in terms of termination liability, as provided in the contract or by tariff;

(B) a one-time special construction charge;

(C) recurring charges for constructed facilities;

(D) a minimum service charge;

(E) an expediting charge; or

(F) a move or relocation charge.

(iii) When an LEC/TELECO submits a proposal or quotation of charges which indicates that special construction will be necessary, he shall be required to submit a detailed special construction proposal as well. All special construction proposals shall be analyzed to (1) determine the adequacy of the proposed construction; (2) disclose excessive or duplicative construction; and (3) when different forms of charge are possible, ensure that the form most advantageous to the Government is provided for.

(iv) When possible, special construction charges should be analyzed and approved prior to provision of the service. If, because of operational requirements, prior approval is not possible and a contractor is authorized to proceed, a ceiling cost for the special construction shall be imposed and sufficient funds obligated by the order to cover the ceiling price.

(v) Special construction provisions shall be administered by the contracting officer issuing the order. This involves administration of the cost and payment provisions, recording the unamortized termination liabilities (if any), and monitoring minimum service charges (MSC) reuse of MSC facilities--all in coordination with the requiring department, office, or agency, and with the Defense Contract Audit Agency, as appropriate.

(vi) Applicability of Construction Labor Standards to orders for Special Construction.

(A) The construction labor standards in FAR 22.4 ordinarily do not apply to "special construction." However, if the special construction includes construction (as defined in FAR 36.102) of a public building or public work, the construction labor standards may be applicable. Applicability must be determined under FAR 22.402.

(B) Individual orders subject to construction labor standards under FAR 22.402 shall specifically recite that fact.

(vii) Special Assembly Rates. Special assembly rates and charges shall be negotiated and contractually incorporated prior to commencement of service. When it is not possible to negotiate in advance, ceiling rates and charges shall be imposed and sufficient funds to cover the ceiling price obligated by the order.

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37.7406-3 Federal supply Schedule Contracts. General Services Administration Federal Supply Schedule contracts covering communication services, including equipment and facilities incidental to the services, are optional for use by the Department of Defense and may be used in accordance with FAR 8.404 when it is not more advantageous to negotiate a separate contract.

37-7407. Funding of Telecommunication Services.

(a) Funding is a comptroller responsibility and shall be handled in accordance with appropriate Department of Defense comptroller related directives and department implementations thereof.

(b) The contracting officer shall assure sufficient funds are available for the telecommunication service being acquired prior to authorizing the commencement of work. Contract actions authorizing service and committing the Government to pay for such service shall obligate such funds necessary to compensate the contractor in accordance with the contract.

(c) In acquisitions of communication services, unlike other types of acquisitions, obligations are usually recorded when the service starts or if and when a cancellation or termination is ordered. Thus, funds are not obligated by the Basic Agreement but are ordinarily obligated by orders issued under the Basic Agreement (see 52.237-7408, Ordering of Facilities and Services--Common Carriers).

(d) Each individual order establishes a basis for the obligation of funds to cover recurring charges for services to be provided during the fiscal year in which the order is issued, together with such one-time charges as are applicable to those services. Obligation of funds for recurring charges for subsequent fiscal years must be subject to the availability of appropriations and in the event funds are not appropriated, a cancellation or termination order must be issued.

37.7408 Competition for Telecommunication Services.

(a) Telecommunication services shall be acquired competitively or be excluded from less than full and open competition in accordance with part 6.

(b) Telecommunication equipment contract modifications or Communication Service Authorization (CSA) modifications, made against telecommunication industry pre-deregulation contracts, may lease additional quantities of telecommunication equipment noncompetitively and without justification provided such lease is within the scope of the existing contract. The requiring activity shall submit to the contracting officer all necessary information required to determine if the additional equipment is within scope. The contracting officer shall make this determination and document the file. As such, pre-deregulation

equipment leases, entered into via CSA, was the regulating governmental body's approved method for ordering service, the contracting officer may continue to consider such pre-deregulation CSA equipment leases to be orders for service until contract expiration or termination.

(c) Acquisition planning for all telecommunication services, including equipment leases as specified in 37.7407(b) above, shall assure that competition is not compromised by requiring specific services or equipment, available solely from a government regulated common carrier, when equivalent nongovernment regulated service is available from other sources.

(d) Telecommunication services available from government regulated common carriers only shall be excluded from less than full and open competition in accordance with part 6. As part of the justification, the contracting officer shall cite the authority granting the common carrier exclusive rights to offer such service (i.e., tariff, FCC ruling, public utility commission ruling, etc).

37.7409 Cost or Pricing Data.

(a) Rates or preliminary estimates quoted by a common carrier for tariffed services are considered to be prices set by regulation within the provisions of Public Law 87-653, even if the tariff will not be established until after execution of the contract. Accordingly, except as provided in (b), common carriers are not required to submit cost or pricing data prior to award of contracts for tariffed services. On the other hand, rates or preliminary estimates quoted by a common carrier for nontariffed service or by a noncommon carrier for any service are not considered to be prices set by regulation; and the provisions of Public Law 87-653 and FAR 15.804 shall be applied accordingly.

(b) Even when not required by Public Law 87-653, certified cost or pricing data shall be obtained whenever the contracting officer is unable to determine that the prices are reasonable on the basis of price analysis (see FAR 15.805-2). However, certified cost or pricing data shall not be required to support annual recurring costs below \$5,000 and nonrecurring costs or basic termination liabilities below \$10,000. Situations in which cost or pricing data may be found necessary within the above policy are:

(1) a tariff, whether filed or contemplated to be filed is for new services installed or developed primarily for Government use (and the data shall cover special construction charges in connection therewith);

(2) a tariff, whether filed or contemplated to be filed, in which specific rates and charges are not included;

(3) more than one commercial source (one or more of which is a noncommon carrier) can offer the desired service but price competition is not considered adequate;

(4) to support the reasonableness of special assembly rates and charges;

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(5) to support the reasonableness of special construction and equipment charges;

(6) to support the reasonableness of those contingent liabilities which are fixed at the outset of the service; or

(7) to support proposed cancellation and termination charges (pursuant to the clause entitled "Cancellation or Termination of Orders") and reuse arrangements (pursuant to the clause entitled "Reuse Arrangements").

(c) Cost of pricing data need not be obtained for each order in the case of services obtained by delivery order under a general call type contract which is negotiated for use by Government ordering activities and includes detailed and approved price schedules as a part of the general contract.

(d) As to the form and detail of cost or pricing data, the following will apply:

(1) for data submitted by common carriers, the data may be in the same form and detail normally submitted to the governmental regulatory body having jurisdiction over the carrier in question; provided, this form and detail is sufficient for the Government to make an adequate evaluation.

(2) for data submitted by other than common carrier, the data should be that required by FAR 15.8.

(e) In the case of noncommon carriers or common carriers quoting for services not to be furnished pursuant to tariff, the contracting activity shall require that the cost or pricing data be accompanied with a certificate as required in FAR 15.804-4. In the case of a common carrier furnishing service pursuant to a tariff filed or to be filed, the contracting activity shall require that data submitted pursuant to (b) above be accompanied with a certificate that to the best of the company's knowledge the data are accurate, complete, and a statement that either:

(1) the rates for services in question are based on these data which will be used or are currently being used to justify the tariff for such service; or

(2) the rates for services in question are not based on these data but are based upon filed tariffs. The contracting activity shall inform carriers required to furnish cost or pricing data under this subparagraph (e) that the data and certifications will be used by the Government, if appropriate, in any subsequent proceedings relative to this tariffed service.

(f) If any noncommon carrier or any common carrier providing a service not to be furnished pursuant to tariff refuses to furnish cost or pricing data required under this paragraph, applications for waiver shall be processed in accordance with FAR 15.804.

37.7410 Periods of Performance.

(a) All telecommunication service contracts, Communication Service Authorizations (CSA), work orders, and modifications thereto shall specify a period of performance.

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(b) In accordance with the Federal Property and Administrative Services Act, as amended, contracts for communication services extending beyond the fiscal year, but no longer than 10 years may be entered into (see FAR Subpart 37.7040-1(a)).

37.7411 Quality Assurance Requirements.

(a) Quality assurance shall be provided for in accordance with part 46.

(b) Prior to ordering telecommunication services, the requiring activity shall designate, to the contracting officer, a technically competent quality assurance evaluator (QAE) and provide the contracting officer a quality assurance plan by which the QAE shall monitor contractor performance.

(c) The QAE shall document contractor nonperformance and report such nonperformance to the contracting officer for action.

37.7412 Telecommunication Specifications.

(a) The Government's telecommunications specifications, standards, and other purchase descriptions shall be prepared in accordance with part 10.

(b) Government requirements, specifications, standards, and other purchase descriptions shall be prepared independent of potential suppliers. Government requirements should be prepared using internal resources, separate contracts for technical support, or two-step sealed bidding.

(c) Requirements, plans, specifications, etc, shall not be prepared in such a way as to restrict competitive sources or unnecessarily require the use of government regulated common carriers.

37.7413 Review of Tariffs.

(a) Contractual arrangements between the government and its telecommunication common carriers may be affected by tariffs approved or modified by appropriate government regulatory bodies. As such, it is critical that the government be aware of common carrier proposed tariffs; review them; and represent its interest during the regulatory hearing process.

(b) The services shall provide for reviewing all tariffs affecting DOD installations, assessing the effect and representing the Government's interest at the regulatory body's hearings. These tasks shall include assessing proposed tariffs effects on an installation-by-installation basis. Coordination between installation, legal, contracting, and other appropriate government personnel shall be provided for.

37.7414 Cancellation and Termination.

(a) Cancellation is the discontinuance of a requirement subsequent to the placing of an order, but prior to initiation of service.

(b) Termination is the discontinuation of a service for the convenience of the Government after the service has been initiated.

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(c) Cancellation or termination charges shall be determined in accordance with the provisions of the applicable tariff or contract.

(d) At the conclusion of a cancellation or termination settlement negotiation, the contracting officer shall document the contract file as to the principal elements involved in the settlement and in a manner which will enable reviewing authorities to understand the appropriateness of the proposed settlement.

(e) Pursuant to the Cancellation or Termination of Orders clause, partial payments on cancellation or termination claims may be made prior to settlement under the applicable policy and procedures of FAR 49.112-1.

37.7415 Contract Clauses.

(a) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common or a noncommon carrier is contemplated.

(1) The clause at 52.237-7400, Definitions (Communications);

(2) The clause at 52.237-7401, Patent Indemnity (Communications);

(3) The clause at 52.237-7402, Access;

(4) The clause at 52.237-7403, Amendment of Contract; and

(5) The clause at 52.237-7404, Obligation of the Government.

(b) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common carrier is contemplated.

(1) The clause at 52.237-7405, Authorization and Consent--Common Carriers;

(2) The clause at 52.237-7406, Continuation of Orders;

(3) The clause at 52.237-7407, Facilities and Services to be Furnished--Common Carriers;

(4) The clause at 52.237-7408, Ordering of Facilities and Services--Common Carriers;

(5) The clause at 52.237-7409, Rates, Charges, and Services--Common Carriers;

(6) The clause at 52.237-7410, Payment--Common Carriers;

(7) The clause at 52.237-7411, Tariff Information;

(8) The clause at 52.237-7412, Cancellation or Termination of Orders--Common Carriers;

(9) The clause at 52.237-7413, Reuse Arrangements;

(10) The clause at 52.237-7414, Submission of Cost or Pricing Data--Common Carriers;

(11) The clause at 52.237-7415, Audit and Records--Common Carriers; and

(12) The clause at 52.237-7416, Term and Termination of Contract--Common Carriers.

(c) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract with a common or a noncommon carrier is contemplated and when special construction charges are expected:

(1) The clause at 52.237-7417, Special Construction and Equipment Charges; and

(2) The clause at 52.237-7418, Title to Communication Facilities and Equipment.

APPENDIX

APPENDIX B

COPY OF ORIGINAL TEXT
DOD FAR SUPPLEMENT 37.74
COMMUNICATIONS SERVICES

**PART 37--SERVICE CONTRACTING
SUBPART 37.74--COMMUNICATION SERVICES**

37.7401 Definitions.

"Appropriate Governmental Regulatory Body" means the Federal Communications Commission, any state-wide regulatory body, or any body with less than state-wide jurisdiction when operating pursuant to state authority. Regulatory bodies whose decisions are not subject to judicial appeal and regulatory bodies which regulate a company owned by the same entity which creates the regulatory body are not "appropriate governmental regulatory bodies" for the purposes of this subpart.

"Common Carriers" means any person, partnership, association, joint-stock company, trust governmental body, or corporation engaged in the business of providing communications services to the general public, normally authorized or franchised by the Federal Communications Commission (FCC) or other appropriate governmental body.

"Communications Services" means those services provided by all types of systems and facilities connected therewith that employ electric or electromagnetic signals to transmit information between two or more points by means of radio, wire, cable, satellite, and other media. Included are telephone, telegraph, teletypewriter, remote writing, remote display, data transmission, facsimile and television transmission services, as well as terminal devices, switches, private branch exchanges, transmission facilities and other components of the systems that supply these services. Also included are all local, post, camp, station or long distance services, as well as all fixed or mobile facilities that are interconnected to systems providing these types of services.

"Foreign Carrier" means any person, partnership, association, joint-stock company, trust, governmental body, or corporation not subject to regulation by an appropriate United States governmental regulatory body and not doing business as a citizen of the United States, which provides communications services outside the territorial limits of the United States.

"Noncommon Carrier" means any entity other than a common carrier which offers communications facilities, services or equipment for lease.

37.7402 Applicability. This subpart applies to acquisition of communications services from communications common carriers regulated by the Federal Communications Commission or an appropriate governmental regulatory body. In addition, except as otherwise specifically provided, this subpart provides guidelines for the acquisition of all other communications services (e.g., from nonregulated common carriers, noncommon carriers and foreign carriers) but is not mandatory for use in such acquisitions.

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37.7403 Policy. In accordance with instructions contained in Department of Defense directives and implementing departmental regulations concerning the operation of commercial and industrial type activities, and specifically with those concerning the sources for communications services, the Department of Defense generally procures communications services of a kind offered by common carriers, including equipment and facilities incidental to those services, from common carriers in accordance with tariff provisions, and at tariff rates established with the Federal Communications Commission (FCC) or with other appropriate governmental regulatory bodies unless cost or operational requirements dictate otherwise.

37.7404 Regulatory Bodies.

(a) The Federal Communications Commission (FCC) and other appropriate governmental regulatory bodies generally publish rules and regulations governing the operations of common carriers and prescribe accounting principles to be employed in the establishment of rates. Notwithstanding other provisions of this Supplement, the regulations, practices, and decisions of the FCC and other appropriate governmental regulatory bodies concerning rates, cost principles, and accounting practices shall be recognized in the procurement of communications services from common carriers. With respect to those issues concerning common carrier services (1) on which the appropriate governmental regulatory body has not expressed itself, (2) over which the appropriate governmental regulatory body has declined jurisdiction, or (3) as to which there is no appropriate governmental regulatory body to make a decision, specific provisions should be made in the contract for adoption of FCC-approved practices or the generally accepted practices of the industry.

(b) Since the Department of Defense frequently requires unusual or special communications services advancing the "state of the art," Defense Department activities frequently move into areas which the cognizant governmental regulatory bodies have not explored. In such situations, the Defense Department frequently is the sole or primary user of many of a given common carrier's offerings. In addition, because of the large volume or normal services which the Defense Department requires, the day-to-day decisions of governmental regulatory bodies may have a vast dollar impact upon it. It is not Defense Department policy to duplicate the efforts of appropriate governmental regulatory bodies or to act as a second regulatory body. On the other hand, the Defense Department's self interest requires that it act as an informed and intelligent consumer, seeing to it that its side of the case is presented to the cognizant bodies and working with the common carriers to ensure that in those areas in which the FCC cannot or will not rule, sound regulatory practices are followed. Every effort should be made to avoid the time and expense of

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litigation by full and fair disclosure of both the carrier's and the Government's position in advance. Nevertheless, in the event actions short of litigation are not productive or just, reasonable or otherwise lawful rates, or when there is a refusal to provide required services or file appropriate tariffs, legal actions should be initiated and vigorously pursued. All contacts with the regulatory bodies should be through cognizant counsel in accordance with established Departmental and Defense Communications Agency procedures.

(c) Upon receipt of tariff information received in accordance with 52.237-7411, Tariff Information, the contracting officer shall immediately provide copies to the cognizant counsel.

37.7405 Sources for Communications Services.

37.7405-1 Common Carriers.

(a) Communication services shall be acquired from the communication common carriers authorized by the appropriate regulatory body to operate within the service area in which the services are required.

(b) Although normally only one carrier is authorized to provide a specific type of service at any given location, there are locations at which no single communication common carrier has the exclusive right to provide the required service. When this is the case and more than one common carrier is authorized and can provide the required service, the acquisition shall be made from the source offering the lowest cost to the Government, if practicable. If this is not practicable, the contract file shall be documented as to the reasons for selection of another source (e.g., unique ability to meet service date; more timely and effective maintenance; security reasons; system integrity). In any event, special assembly items and entire communications systems shall be acquired using full and open competition unless otherwise authorized under FAR Subpart 6.3; and every effort should be made to exclude from the service contract any provisions which would require the Government to lease from the source of service any associated and related items such as circuits, circuit extensions, and terminal equipment.

37.7405-2 Noncommon Carriers. While communications services generally shall be acquired from common carriers, they may be acquired from noncommon carriers when equipment and the services function as a complete communication system or are an integral part of a communication system. Equipment and services shall be considered an integral part of a communication system if the combination of equipment and services is necessary to perform the desired services.

37.7405-3 Foreign Carriers. The acquisition of communication services within or between foreign countries and the acquisition from

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a foreign carrier of communication services from a foreign country to the United States present problems beyond the scope of this subpart. Frequently, foreign carriers are owned by the Government of the country in which they operate, and their methods of doing business are prescribed by the foreign Government. In many countries, an international agreement with the host country prescribes guidelines for how the Defense Department will obtain communication services. In addition, there are frequently severe problems with taxes on communications in foreign countries. In other countries, a corporate subsidiary of a carrier not indigenous to the country (often a U.S. parent) is the sole source for communication services. As a general rule in foreign countries, rates and practices should be spelled out in as much detail as possible in a contractual document. It consistently has been Defense Department policy not to pay discriminatory rates and to pay no more for communication services in a foreign country than does the military of that country. Special problems with communications procurement in foreign countries should be channeled to higher headquarters for resolution with the assistant of State Department representatives as appropriate.

37.7406 Who May Acquire Communication Services.

(a) The general authority of the Head of a Contracting Activity contained in FAR 1.601 includes the acquisition of communication services. In addition, the Administrator, General Services Administration, has delegated to the Secretary of Defense under the terms of the Federal Property and Administrative Services Act, as amended, authority to enter into contracts for communication services extending beyond the fiscal year, but not longer than ten years under the following circumstances:

- (1) the Government obtains lower rates, larger discounts, or more favorable conditions of service than those available under a contract for a definite term not extending beyond the current fiscal year; or
- (2) nonrecurring or termination charges payable under contracts for a definite term not extending beyond the current fiscal year are eliminated or reduced; or
- (3) the carrier refuses to render the desired service except under contract for a definite term extending beyond the current fiscal year.

(b) The Secretary of Defense has delegated the authority to him by the Administrator, GSA, to the Secretaries of the Military Departments and the Director, Defense Communications Agency, who have in turn delegated it to the following (with power of redelegation):

- (1) for the Department of the Army: The Commanding General, United States Army Information Systems Command.

(2) for the Department of the Navy: The Commander, Naval Facilities Engineering Command;

(3) for the Department of the Air Force: The Deputy Chief of Staff, Research Development and Acquisition; and the Director of Contracting and Manufacturing Policy, DCS/RD&A, HQ USAF;

(4) for the Defense Communications Agency: The Chief, Defense Commercial Communications Office;

(5) for the Defense Logistics Agency: for the leasing of local telecommunications facilities and services, Commanders of DLA centers, depots, and DCAS regions; and

(6) for the Defense Nuclear Agency: for contracts not in excess of \$1,000,000, The Commander, Field Command, DNA.

(c) The ten-year limitation of (a) above does not apply to "general contracts" (see 37.7408) but to obligating the Government for a longer period than ten years by orders placed under the general contract.

37.7407 Cost or Pricing Data.

(a) Rates or preliminary estimates quoted by a common carrier for tariffed services are considered to be prices set by regulation within the provisions of Public Law 87-653, even if the tariff will not be established until after execution of the contract. Accordingly, except as provided in (b), common carriers are not required to submit cost or pricing data prior to award of contracts for tariffed services. On the other hand, rates or preliminary estimates quoted by a common carrier for nontariffed service or by a noncommon carrier for any service are not considered to be prices set by regulation; and the provisions of Public Law 87-653 and FAR 15.804 shall be applied accordingly.

(b) Even when not required by Public Law 87-653, certified cost or pricing data shall be obtained whenever the contracting officer is unable to determine that the prices are reasonable on the basis of price analysis (see FAR 15.805-2). However, certified cost or pricing data shall not be required to support annual recurring costs below \$5,000 and nonrecurring costs or basic termination liabilities below \$10,000. Situations in which cost or pricing data may be found necessary within the above policy are:

(1) a tariff, whether filed or contemplated to be filed is for new services installed or developed primarily for Government use (and the data shall cover special construction charges in connection therewith);

(2) a tariff, whether filed or contemplated to be filed, in which specific rates and charges are not included;

(3) more than one commercial source (one or more of which is a noncommon carrier) can offer the desired service but price competition is not considered adequate;

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(4) to support the reasonableness of special assembly rates and charges;

(5) to support the reasonableness of special construction and equipment charges;

(6) to support the reasonableness of those contingent liabilities which are fixed at the outset of the service; or

(7) to support proposed cancellation and termination charges (pursuant to the clause entitled "Cancellation or Termination of Orders") and reuse arrangements (pursuant to the clause entitled "Reuse Arrangements").

(c) Cost or pricing data need not be obtained for each order in the case of services obtained by delivery order under a general call type contract which is negotiated for use by Government ordering activities and includes detailed and approved price schedules as a part of the general contract.

(d) As to the form and detail of cost or pricing data, the following will apply:

(1) for data submitted by common carriers, the data may be in the same form and detail normally submitted to the governmental regulatory body having jurisdiction over the carrier in question; provided, this form and detail is sufficient for the Government to make an adequate evaluation.

(2) for data submitted by other than common carrier, the data should be that required by FAR 15.8.

(e) In the case of noncommon carriers or common carriers quoting for services not to be furnished pursuant to tariff, the contracting activity shall require that the cost or pricing data be accompanied with a certificate as required in FAR 15.804-4. In the case of a common carrier furnishing service pursuant to a tariff filed or to be filed, the contracting activity shall require that data submitted pursuant to (b) above be accompanied with a certificate that to the best of the company's knowledge the data are accurate, complete, and a statement that either;

(1) the rates for services in question are based on these data which will be used or are currently being used to justify the tariff for such service; or

(2) the rates for services in question are not based on these data but are based upon filed tariffs.

The contracting activity shall inform carriers required to furnish cost or pricing data under this subparagraph (e) that the data and certifications will be used by the Government, if appropriate, in any subsequent proceedings relative to this tariffed service.

(f) If any noncommon carrier or any common carrier providing a service not to be furnished pursuant to tariff refuses to furnish cost or pricing data required under this paragraph, applications for waiver shall be processed in accordance with FAR 15.804.

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37.7408 Type of Contract.

37.7408-1 General. Generally, the procurement of communication services is facilitated by a contractual arrangement which (a) permits the activities served to order services directly from time to time as specific requirements are developed; and/or (b) provides a written instrument of understanding between the Department of Defense or a contracting activity and the contractor which sets forth the basis under which future procurements will be entered into as required during the term of the agreement.

37.7408-2 General Agreements. General agreements, referred to as "general contracts" within the communication industry, are widely used to facilitate awards for communication services. Such an instrument is not a contract, but rather represents a written instrument of understanding executed between a procurement activity and a communications contractor which sets forth the negotiated contract clauses and other matters which shall be applicable to future procurements entered into between the parties during the term of agreement. The general agreement together with the order issued thereunder (see 37.7408-3) represents the contract. General agreements shall not be used in any manner to restrict available competition. All general agreements will be executed in the name of the United States Government.

37.7408-3 Communication Service Authorization (CSA). DD Form 428, Communication Service Authorization (CSA), or an electronic data processing substitute (when the volume of transactions necessitates preparation of orders by other than manual process, a format suitable for an electronic data processing system may be used in lieu of DD Form 428, provided that all essential elements of the DD Form 428 are incorporated) shall be used to order services under the general contract and to modify, cancel, or terminate services when a CSA has been used to establish the service. As a general rule, prices should be established prior to authorizing the contractor to begin work. However, when the contractor is allowed to begin work prior to pricing in accordance with this paragraph, an estimated price or ceiling shall be included; and the contractor and the contracting officer shall proceed with definitive pricing as soon as practicable. In addition, a CSA may be issued which includes a ceiling or a series of ceilings for the stated services. Normally, this type of CSA is called a "maximum limit authorization" in the communications industry. This maximum limit authorization also may provide, in addition to the established ceilings, limited authority to designated individuals to effect modifications in service within the dollar ceilings by the use of work orders designated for this purpose. Each CSA issued under a

general agreement shall be subject to such reviews, approvals and determinations and findings specified in this Supplement as would be applicable if the CSA were a contract entered into apart from the general contract.

37.7408-4 Federal Supply Schedule Contracts. General Services Administration Federal Supply Schedule contracts covering communication services, including equipment and facilities incidental to the services, are optional for use by the Department of Defense and may be used in accordance with FAR 8.404 when it is not more advantageous to negotiate a separate contract. The DD Form 428 may be used as a delivery order.

37.7409 Funding of Communication Service Authorizations (CSA) Under General Contracts.

(a) Funding is a comptroller responsibility and shall be handled in accordance with appropriate Department of Defense comptroller related directives and departmental implementations thereof. The guidelines in (b) through (e) below are provided for the contracting officer's information.

(b) In acquisitions of communication services, unlike other types of acquisitions, obligations are usually recorded when the service starts or if and when a cancellation or termination is ordered. Thus funds are not obligated by the "general contract," but are ordinarily obligated by CSAs issued under the "general contracts" (see 52.237-7408, Ordering of Facilities and Services--Common Carriers).

(c) Each individual CSA establishes a basis for the obligation of funds to cover recurring charges for services to be provided during the fiscal year in which the CSA is issued, together with such one-time charges as are applicable to those services.

(d) The same CSA continues to be the basis for the obligation of funds when the same services are required to be continued into subsequent fiscal years. However, obligation of funds for recurring charges for such subsequent fiscal years must be subject to the availability of appropriations therefor; and in the event funds are not appropriated, a cancellation or termination CSA must be issued.

(e) The contracting officer, through his comptroller, must insure that funds are available at the time service is provided or at the time a cancellation or termination CSA is issued. FAR 32.702-2 does not apply to the issuance of CSAs.

37.7410 Special Construction.

37.7410-1 General.

(a) Special Construction, as defined by tariffs, normally involves the furnishing of some special service or facility by a

common carrier incident to the performance of the basic service. Under a given tariff, this may include (1) moving or relocating specified equipment, (2) providing temporary facilities, (3) expediting provision of facilities, or (4) providing channel facilities which must be specially constructed to meet the requirements of the Government. The procurement of "special construction," as that term is used in the communication industry, shall be governed by the provisions of this part and shall not ordinarily be subject to the provisions of FAR 36.

(b) Special construction costs may take the following forms:

(1) contingent liability for utilizing the services for a shorter period of time than the specified minimum to reimburse the contractor for his unamortized nonrecoverable costs and usually expressed in terms of a termination liability, as provided in the contract or by tariff;

(2) a one-time special construction charge;

(3) recurring charges for constructed facilities;

(4) a minimum service charge;

(5) an expediting charge; or

(6) a move or relocation change.

(c) When a common carrier submits a proposal or quotation of charges which indicates that special construction will be necessary, he shall be required to submit a detailed special construction proposal as well. All special construction proposals shall be analyzed to (1) determine the adequacy of the proposed construction; (2) disclose excessive or duplicative construction; and (3) when different forms of charge are possible, insure that the form most advantageous to the Government is provided for.

(d) When possible, special construction charges should be analyzed and approved prior to provision of the service. If, because of operational requirements, prior approval is not possible and a contractor is authorized to proceed, a ceiling cost for the special construction shall be imposed. Special construction charges must be approved and authorized prior to total payment thereof.

(e) Special construction provisions shall be administered by the contracting officer issuing the CSA. This involves administration of the cost and payment provisions, recording the unamortized termination liabilities (if any), and monitoring minimum service charges (MSC) reuse of MSC facilities--all in coordination with the requiring Department, office or agency and with the Defense Contract Audit Agency, as appropriate.

37.7410-2 Applicability of Construction Labor Standards to CSAs for Special Construction.

(a) The construction labor standards in FAR 22.4 ordinarily do not apply to "special construction." However, if the special

construction includes construction (as defined in FAR 36.102) of a public building or public work, the construction labor standards may be applicable. Applicability must be determined under FAR 22.402.

(b) Individual CSAs which are subject to construction labor standards under FAR 22.402 shall specifically recite that fact.

37.7411 Special Assembly.

(a) Special assembly is the designing, manufacturing, arranging, assembling or wiring of an item or items of equipment to provide service that cannot be provided with equipment normally employed for general use.

(b) Special assembly rates and charges shall be based on estimated costs and shall be negotiated prior to commencement of service whenever possible. When it is not possible to negotiate in advance, the initial rates and charges shall be preliminary and tentative only and shall be subject to adjustment to the extent appropriate at the time that final rates and charges are negotiated.

37.7412 Cancellation and Termination.

(a)(1) Cancellation is the discontinuance of a requirement subsequent to the placing of an order, but prior to initiation of service.

(2) Termination is the discontinuation of a service for the convenience of the Government after the service has been initiated.

(b) Cancellation or termination charges shall be determined in accordance with the provisions of the applicable tariff or contract.

(c) At the conclusion of a cancellation or termination settlement negotiation, the contracting officer shall document the contract file as to the principal elements involved in the settlement and in a manner which will enable reviewing authorities to understand the appropriateness of the proposed settlement.

(d) Pursuant to the Cancellation or Termination of Orders clause, partial payments on cancellation or termination claims may be made prior to settlement under the applicable policy and procedures of FAR 49.112-1

37.7413 Contract Clauses.

(a) The contracting officer shall insert the following clauses, modified if necessary to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common or a noncommon carrier is contemplated.

(1) The clause at 52.237-7400, Definitions (Communications);

(2) RESERVED.

- (3) The clause at 52.237-7402, Access;
- (4) The clause at 52.237-7403, Amendment of Contract; and
- (5) The clause at 52.237-7404, Obligation of the Government.

(b) The contracting officer shall insert the following clauses, modified if necessary to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common carrier is contemplated.

- (1) RESERVED.
- (2) The clause at 52.237-7406, Continuation of Orders;
- (3) The clause at 52.237-7407, Facilities and Services to be Furnished--Common Carriers;
- (4) The clause at 52.237-7408, Ordering of Facilities and Services--Common Carriers;
- (5) The clause at 52.237-7409, Rates, Charges, and Services--Common Carriers;
- (6) The clause at 52.237-7410, Payment--Common Carriers;
- (7) The clause at 52.237-7411, Tariff Information;
- (8) The clause at 52.237-7412, Cancellation or Termination of Orders--Common Carriers;
- (9) The clause at 52.237-7413, Reuse Arrangements;
- (10) The clause at 52.237-7414, Submission of Cost or Pricing Data--Common Carriers;
- (11) The clause at 52.237-7415, Audit and Records--Common Carriers; and
- (12) The clause at 52.237-7416, Term and Termination of Contract--Common Carriers.

(c) The contracting officer shall insert the following clauses, modified if necessary to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract with a common or a noncommon carrier is contemplated and when special construction charges are expected:

- (1) The clause at 52.237-7417, Special Construction and Equipment Charges; and
- (2) The clause at 52.237-7418, Title to Communication Facilities and Equipment.

APPENDIX

APPENDIX C

SUMMARY OF PROPOSED CHANGES TO DOD FAR SUPPLEMENT 37.74

Appendix C

SUMMARY OF PROPOSED CHANGES TO DOD FAR SUPPLEMENT 37.74

<u>Current_Ref</u>	<u>Draft_Ref</u>	<u>Summary_of_Change</u>
-	37.7400	Discussion of the subpart's scope; regulated and nonregulated telecommunication services within the United States.
-	37.7401	General policy statement on the acquisition of regulated service from common carriers and nonregulated service via competition.
37.7401	37.7402	Definitions. Current definitions retained. Additional definitions added to clarify current industry services and acronyms.
37.7402	37.7400/ 37.7401	Intent of current reference incorporated in draft references. Purpose and applicability of this subpart are discussed.
37.7403	37.7401	Current policy statement retained but modified to provide for acquisition of nonregulated telecommunication services.
37.7404	37.7403-1	No change. Still applicable to regulatory bodies.
37.7405	37.7405	In lieu of discussing the services previously offered by common carriers, the new categories of service and their general method of acquisition are discussed. This is necessary as common carriers no longer offer all telecommunication service.

<u>Current_Ref</u>	<u>Draft_Ref</u>	<u>Summary_of_Change</u>
37.7406	37.7404	Current reference retained and expanded to address acquisition authority. Head, Contracting Activity (HCA) authority is discussed as well as that of the contracting officer.
37.7407	37.7409	No change. Still applicable to common and noncommon carriers as specified.
37.7408	37.7406	Current reference modified. Provision for using standard contract types in nonregulated telecommunication acquisitions added. The use of Communication Service Authorizations as a procurement instrument is deleted and use of a basic agreement and DD 1155 substituted. This arrangement is consistent with existing acquisition methods and is more easily understood by the contracting and finance communities.
37.7409	37.7407	Current reference retained and expanded. Language added to clarify that funds must be obligated by the contracting officer when telecommunications services are ordered.
37.7410	37.7402/ 37.7406	No change. Still applicable to regulated service.
37.7411	37.7406	No change. Still applicable to regulated service.
37.7412	37.7414	No change. Still applicable to telecommunication services.
37.7413	37.7415	No change.
-	37.7408	Provisions added specifying competition policy for telecommunication services.
-	37.7410	Policy added requiring specific periods of performance in all telecommunication service contracts. This was not done prior to deregulation.

- 37.7411 Quality assurance requirements are added to assure adequate oversight of contractor services and prompt reporting of substandard contractor performance.
- 37.7412 Requirement for adequate telecommunication plans and specifications added to assure Government needs are satisfied and competition is not compromised.
- 37.7413 Procedure added to review all proposed tariff changes and to interact in the regulatory process to defeat disadvantageous tariffs.

APPENDIX

APPENDIX D

FEDERAL ACQUISITION REGULATION (FAR)

REGULATORY CHANGES

CASE FORMAT

MEMORANDUM TO THE DIRECTOR
DEPARTMENT OF DEFENSE (DOD) FAR COUNCIL

A. PROBLEM

The DOD FAR Supplement governing the acquisition of telecommunications need revision due to the divestiture of the American Telephone and Telegraph (AT&T) Co. and the deregulation of the telecommunications industry. The Air Force, and the DOD, must change its acquisition practices if it is to become a responsibly aggressive telecommunication consumer. The principles of competition, effective contract writing, and government oversight of contractor performance must be adopted by the DOD's telecommunication acquisition community. The use of current DOD FAR Subpart 37.74 provisions do not sufficiently address these principles in a competitive and deregulated marketplace.

B. RECOMMENDATION

TAB A - Proposed DOD FAR Subpart 37.74 Revision.
TAB B - Collateral Requirements (Tab B-1 thru B-3)

C. DISCUSSION

REVISING THE FEDERAL ACQUISITION REGULATION (FAR)
FOR TELECOMMUNICATIONS ACQUISITION

The telephone began as a mechanical invention that mushroomed into a system of universal service dominated by a single source of supply for over 75 years. This "single source" system bred consumer reliance and dependence in exchange for superior telecommunications service. All was well and good until the "single source" system was discarded by the telecommunication industry's deregulation and divestiture of AT&T, the "single source." The market place has changed; the players have changed. How should the Air force meet its base telephone/telecommunication mission in light of these changes? How should the Air Force cope with such problems as multiple vendors, regulated versus unregulated service; scarce technical expertise, changing tariffs, ambiguous contracts, etc. A partial answer is to set new acquisition guidelines for the new telecommunications acquisition environment in which the Air Force and the DoD find themselves.

The Federal Acquisition Regulation (FAR), part 37, sets general policy for the acquisition of services. The FAR defines such categories of services as nonpersonal, personal, and consulting, but does not go into any great detail on the acquisition of specialized services, i.e., engineering, mortuary, education, or laundry services. Such specific policy is contained in the DoD FAR Supplement. Subpart 37.74 of this supplement specifies policy and procedures for acquiring communication services but is little more than a reprint of its acquisition regulation predecessors, the Defense Acquisition Regulation (DAR) and the Armed Services Procurement Regulation (ASPR). The supplement mostly applies to acquiring government regulated telecommunication services and does not address the industry's currently competitive and fragmented environment. The DoD FAR Supplement must be revised to prescribe policies and responsibilities for today's telecommunication's service acquisitions. To continue using the existing supplement is to play game "X" using game "Y's" rules; to do business in a competitive marketplace where it's "buyer beware" using policies developed for government controlled monopolies which now only partially provide our telecommunication services.

FAR REVISIONS AND RATIONALE

DoD FAR Supplement, subpart 37.74 must be revised to deal with the issues discussed in chapter three as follows:

- a) Categories and sources of today's telecommunications services.
- b) Competition versus less than full and open competition.
- c) Contract ambiguities.
- d) Lack of technical expertise.
- e) Multiple contractors.
- f) Quality assurance.
- g) Informal working relationships.
- h) Tariff changes.

- 1) Protect the Government's rights under the contract.

Policy and procedures to deal with these issues have been formulated and are presented in Appendix A as a draft revision of the DoD FAR Supplement. Changes between the existing and proposed supplements are as follows:

- a) Section 37.7401. General policy regarding telecommunication service acquisition is specified. Two general types of service are prescribed for acquisition--government regulated common carrier service and competitive service.

- b) Section 37.7402. Telecommunication industry definitions are expanded.

- c) Section 37.7404. The policy regarding "Who may acquire telecommunication service" is unchanged. Clarification of the contracting officer's (CO) authority and that of his designated representative is added to reinforce the CO's role in telecommunications acquisition; limit the CO's representative to within contract scope activities (consistent with government contract law); and direct that the CO be notified of deficient contractor performance. Such policy is necessary to protect the government's rights and preempt "freewheeling working relationships" from impacting the mission regardless of their good intentions.

- d) Section 37.7405. Telecommunication industry deregulation and AT&T divestiture (D&D) created many different categories of service which may overlap. This section discusses such categories of service and their general method of acquisition. Such information is necessary to determine the applicability of competition; prescribe definite contract terms and conditions; determine the necessity for single versus multiple contracts (thus single or multiple vendors); and to determine the applicability of tariffs.

- e) Section 37.7406. Prior to D&D, a specialized sole source TELCO contract dominated telecommunication acquisition. This section revises that to specify that non-regulated service contracts shall be written and awarded consistent with general service contract requirements (FAR, part 16). A special contract arrangement, similar to its pre-D&D predecessor, the Communication Service Authorization (CSA), shall be used for regulated services. For both contract types, specific terms, conditions, and aggressive contract administration is required. Such policy contributes to eliminating contract ambiguities, provides for managing multiple vendors, reduces the need to rely on informal government/contractor relationships to assure performance and overall provides the basis for protecting the Government's rights.

f) Section 37-7407. This expanded section specifies that the CO shall verify the availability of funds prior to authorizing service. Additionally, funds must be obligated when service is ordered. This policy protects the Government from unauthorized obligations and is consistent with the Anti-Deficiency Act. Further more, it serves as a check on informal relationships seeking to get things done without regard for availability of funds.

g) Section 37-7408. Prior to D&D, most telecommunication contracts/orders were "sole sourced" to the TELCO. This section prescribes competition as the rule with exceptions made only with adequate justification. Provision is made, however, for the continued use and modification of existing CSAs until their expiration. This policy supports competition.

h) Section 37.7410. Contract expiration is essential to plan for continued service, competition, funding, etc. Existing telecommunication contracts generally did not include contract expirations. This section requires telecommunication contracts/orders to explicitly state the performance period. This requirement supports competition, eliminates a currently major ambiguity and is essential in protecting the Government's rights.

i) Section 37.7411. Informal working relationships with the TELCO generally included little quality assurance oversight or inspection. In an era of "buyer beware" this section requires a competent government overseer and a plan for conducting such oversight. The requiring activity is directed to report contractor nonperformance to the CO. This section supports managing multiple vendors, compensating for minimal technical expertise, provides the basis for aggressive quality assurance and prevents informal working arrangements from negatively affecting contract requirements.

h) Section 37.7412. The government seldom prepared telecommunication specifications prior to D&D. It ordered what the TELCO suggested for the service the government wanted. Such practice today would be acquisition suicide. This section mandates that specs be written to support competition. Should technical expertise be unavailable, special contracting procedures are authorized to competitively acquire technical proposals or contract-out for firm specifications. This section supports competition, compensates for inadequate technical expertise, provides for firm specs making multiple vendors more manageable, enhances quality assurance, and contributes to eliminating major technical ambiguities.

k) Section 37.7413. Government (FCC/PUC) regulation may negatively impact DoD contracts by requiring actions contrary to the contract. This section requires the services to set up a system for reviewing all proposed tariffs, assessing their impact on DoD installations, and presenting the DoD's concerns to the appropriate regulatory body prior to tariff approval. This policy is critical in maintaining the integrity of the Government's contract, continuing the necessary services, and sustaining the Government's contractual rights.

CORRECTIVE ACTIONS

I recommend revising the DoD FAR Supplement, subpart 37.74, for acquiring telecommunication services and that the draft at Appendix A be used as a framework for such revision. It is only through such revision that the acquisition community will have the proper guidance to operate in today's telecommunication market environment and acquire the right services at the right time and place to fulfill mission needs. Without such changes, deficiencies in technical planning, acquisition planning, and the solicitation, award, and administration of contracts will continue. Such poor acquisition translates into potentially poor service. In an era of scarce fiscal resources and high threats, poor communications, especially our routine daily telecommunication services, must be efficient and effective or result in squandered dollars and compromised command and control. The stakes are too high to allow this to happen. I recommend that the proposed DOD FAR Supplement, Subpart 37.74 at Tab A be approved and implemented.

PART 37--SERVICE CONTRACTING
SUBPART 37.74--COMMUNICATION SERVICES

37.7400 Scope. This subpart prescribes policy and procedures to be used in the acquisition of government regulated and competitively available telecommunication services within the United States. It may be used as a guide for similar acquisitions outside the United States.

37.7401 General Policy. In accordance with instructions contained in Department of Defense directives and implementing departmental regulations concerning the operation of commercial and industrial type activities, and specifically with those concerning the sources for telecommunications services, the Department of Defense generally acquires two categories of telecommunication services; common carrier services regulated by appropriate governmental bodies and other contractor services competitively available in the open market. Regulated common carrier services, including equipment and facilities incidental to those services, are acquired in accordance with and are subject to tariff provisions and rates approved by the appropriate governmental body. All non-government regulated telecommunication services are acquired in accordance with Part 6.

37.7402 Definitions.

"Appropriate Governmental Regulatory Body" means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating pursuant to state authority. Regulatory bodies whose decisions are not subject to judicial appeal and regulatory bodies which regulate a company owned by the same entity which creates the regulatory body are not "appropriate governmental regulatory bodies" for the purposes of this subpart.

"Common Carriers" means any person, partnership, association, joint-stock company, trust governmental body, or corporation engaged in the business of providing communications services to the general public, normally authorized or franchised by the Federal Communications Commission (FCC) or other appropriate governmental body.

"Customer Premise Equipment" (CPE) means that equipment owned by the telecommunications subscriber and located on his premises which permits interconnection with and communication over the common carriers telecommunication network.

"Foreign Carrier" means any person, partnership, association, joint-stock company, trust, governmental body or corporation not subject to regulation by an appropriate United States governmental regulatory body and not doing business as a citizen of the United States, which provides communications services outside the territorial limits of the United States.

"Franchise" means sole authority granted by an appropriate government regulatory body to a corporation or individual to use public property, render service to the public, and to make charges for such service.

"Local Exchange Carrier" (LEC) is that common carrier possessing the franchise to provide local telephone service within a specific geographically defined exchange area.

"Noncommon Carrier" means any entity other than a common carrier which offers communications facilities, services, or equipment for lease.

"Special Assembly" means the designing, manufacturing, arranging, assembling or wiring of an item or items of equipment to provide service that cannot be provided with equipment normally employed for general use.

"Special Construction" means the furnishing of some special service or facility by a common carrier incident to the performance of the basic service. Under a given tariff, this may include (1) moving or relocating specified equipment, (2) providing temporary facilities, (3) expediting provision of facilities, or (4) providing channel facilities which must be specially constructed to meet the requirements of the Government. The procurement of "special construction," as that term is used in the communication industry, shall be governed by the provisions of this part and shall not ordinarily be subject to the provisions of FAR 36.

"Telecommunications Services" means those services provided by all types of systems and facilities connected therewith that employ electric or electromagnetic signals to transmit information between two or more points by means of radio, wire, cable, satellite, and other media. Included are telephone, telegraph, teletypewriter, remote writing, remote display, data transmission, facsimile and television transmission services, as well as terminal devices, switches, private branch exchanges, transmission facilities, and other components of the systems that supply these services. Also included are all local, post, camp, station, or long distance services, as well as all fixed or mobile facilities that are interconnected to systems providing these types of services.

"Telephone Company" (TELCO) is synonymous with "local exchange company" (LEC).

37.7403 Special Telecommunication Organizations:

37.7403-1 Regulatory Bodies.

(a) The Federal Communications Commission (FCC) and other appropriate governmental regulatory bodies generally publish rules and regulations governing the operations of common carriers and prescribe accounting principles to be employed in the establishment of rates. Notwithstanding other provisions of this Supplement, the regulations, practices, and decisions of the FCC and other appropriate governmental regulatory bodies concerning rates, cost principles, and accounting practices shall

be recognized in the procurement of communications services from common carriers. With respect to those issues concerning common carrier services (1) on which the appropriate governmental regulatory body has not expressed itself, (2) over which the appropriate governmental regulatory body has declined jurisdiction, or (3) as to which there is no appropriate governmental regulatory body to make a decision, specific provisions should be made in the contract for adoption of FCC-approved practices or the generally accepted practices of the industry.

(b) Since the Department of Defense frequently requires unusual or special communications services advancing the "state of the art," Defense Department activities frequently move into areas which the cognizant governmental regulatory bodies have not explored. In such situations, the Defense Department frequently is the sole or primary user of many of a given common carrier's offerings. In addition, because of the large volume or normal services which the Defense Department requires, the day-to-day decisions of governmental regulatory bodies may have a vast dollar impact upon it. It is not Defense Department policy to duplicate the efforts of appropriate governmental regulatory bodies or to act as a second regulatory body. On the other hand, the Defense Department's self interest requires that it act as an informed and intelligent consumer, seeing to it that its side of the case is presented to the cognizant bodies and working with the common carriers to ensure that in those areas in which the FCC cannot or will not rule, sound regulatory practices are followed. Every effort should be made to avoid the time and expense of litigation by full and fair disclosure of both the carrier's and the Government's position in advance. Nevertheless, in the event actions short of litigation are not productive or just, reasonable or otherwise lawful rates, or when there is a refusal to provide required services or file appropriate tariffs, legal actions should be initiated and vigorously pursued. All contacts with the regulatory bodies should be through cognizant counsel in accordance with established Departmental and Defense Communications Agency procedures.

(c) Upon receipt of tariff information received in accordance with 52.37-7411, Tariff Information, the contracting officer shall immediately provide copies to the cognizant counsel.

37-7403-2 Foreign Carriers. The acquisition of communication services within or between foreign countries and the acquisition from a foreign carrier of communication services from a foreign country to the United States present problems beyond the scope of this subpart. Frequently, foreign carriers are owned by the government of the country in which they operate, and their methods of doing business are prescribed by the foreign government. In many countries, an international agreement with

the host country prescribes guidelines for how the Defense Department will obtain communication services. In addition, there are frequently severe problems with taxes on communications in foreign countries. In other countries, a corporate subsidiary of a carrier not indigenous to the country (often a U.S. parent) is the sole source for communication services. As a general rule in foreign countries, rates and practices should be spelled out in as much detail as possible in a contractual document. It consistently has been Defense Department policy not to pay discriminatory rates and to pay no more for communication services in a foreign country than does the military of that country. Special problems with communications procurement in foreign countries should be channeled to higher headquarters for resolution with the assistance of State Department representatives as appropriate.

37.7404 Acquisition Authority:

37.7404-1 Who may Acquire Telecommunication Services.

(a) The general authority of the Head of a Contracting Activity contained in FAR 1.601 includes the acquisition of communication services. In addition, the Administrator, General Services Administration, has delegated to the Secretary of Defense under the terms of the Federal Property and Administrative Services Act, as amended, authority to enter into contracts for communication services extending beyond the fiscal year, but not longer than 10 years under the following circumstances:

(1) The Government obtains lower rates, larger discounts, or more favorable conditions of service than those available under a contract for a definite term not extending beyond the current fiscal year; or

(2) nonrecurring or termination charges payable under contracts for a definite term not extending beyond the current fiscal year are eliminated or reduced; or

(3) the carrier refuses to render the desired service except under contract for a definite term extending beyond the current fiscal year.

(b) The Secretary of Defense has delegated the authority to him by the Administrator, GSA, to the Secretaries of the Military Departments and the Director, Defense Communications Agency, who have in turn delegated it to the following (with power of redelegation):

(1) for the Department of the Army: The Commanding General, United States Army Communications Command; and the Commanding General, United States Continental Army Command;

(2) for the Department of the Navy: The Commander, Naval Facilities Engineering Command;

(3) For the Department of the Air Force: The Deputy Chief of Staff, Research Development and Acquisition; and the Director of Contracting and Manufacturing Policy, DCS/RD&A, HQ USAF;

(4) for the Defense Communications Agency: The Chief, Defense Commercial Communications Office;

(5) for the Defense Logistics Agency: for the leasing of local telecommunications facilities and services, Commanders of DLA centers, depots, and DCAS regions; and

(6) for the Defense Nuclear Agency: for contracts not in excess of \$1,000,000, the Commander, Field Command, DNA.

(c) The ten-year limitation of (a) above does not apply to "general contracts" (see 37.7408) but to obligating the Government for a longer period than ten years by orders placed under the general contract.

37.7404-2 Contracting Officer Authority. The contracting officer's authority shall be as specified in FAR 1.601. Individuals designated in writing as representatives of the contracting officer shall interface with contractors in accordance with their delegation and the terms and conditions of the contract. Under no circumstances shall such designated or non-designated government employees direct the contractor or levy requirements outside of the contract scope or contracting officer's delegation. Violations of this policy may be considered a ratification action in accordance with Part 1.670.

37.7405 Telecommunication Service Categories.

37.7405-1 General. Telecommunication services can be categorized in several different ways by (a) the service offering (i.e., local service, long distance, etc); (b) the basis of the offering (i.e., tariff vs nontariff); and (c) the applicability of government regulation. The contracting officer must fully understand these categories and their relationships to adequately plan the acquisition.

37.7405-2 Local Telecommunication Service. Service offered solely by a franchised local exchange company (LEC) or telephone company (TELCO) for the franchised area. Such service is offered in accordance with and subject to tariff provisions and rates approved by the state public utilities commission or other appropriate governmental body.

37.7405-3 Long Distance Service. Long distance service, also referred to as direct dial long distance service, is the transportation of a telephone call. Such service is offered by common carriers who are required to file tariffs but are not regulated by the FCC. As this service is not reserved for any single franchised company, it shall be acquired competitively in accordance with Part 6.

37.7405-4 Basic Service. A common carrier offering of transmission capacity for the movement of information between two or more points. Such service is offered by the TELCO and long distance vendors.

37.7405-5 Enhanced Service. A transmission offering over common carrier facilities which employs computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscribers transmitted information. Enhanced service provides the subscriber with additional, different, or restructured information involving interactions with stored information. Such service is not government regulated and shall be acquired competitively in accordance with Part 6.

37.7405-6 Tariffed Service. Telecommunication service offered by common carriers who are required to submit their offerings to appropriate government bodies. Service is provided in accordance with the tariffs; the provisions and rates as specified in the tariffs are binding upon all parties. TELCO tariffs are generally reviewed and approved by state public utility commissions. Long distance tariff filings are required by the FCC; however, the commission generally accepts them via forbearance. Tariffed service should be assumed a competitive acquisition until thorough acquisition planning substantiates justification of less than full and open competition.

37.7405-7 Non-Tariffed Service. Telecommunication service for which tariff filings are not required. Such service is not government regulated and shall be acquired in accordance with Part 6.

37.7405-8 Customer Premise Equipment (CPE) Charges. Prior to the FCC's deregulation of CPE, it was customary for telephone service customers to subscribe for such service by leasing necessary telephone equipment; such was the approved tariff pricing structure. Since deregulation, however, CPE is generally non-tariffed and new acquisitions of CPE items shall be treated as equipment acquisitions in lieu of service, providing title to such equipment vests with the government.

37.7406 Types of Contracts.

37.7406-1 Contracts for Non-Government Regulated Service. The type of contract executed for non-Government regulated telecommunication service shall be selected in accordance with subpart 16.1.

37.7406-2 Contracts for Government Regulated Service.

(a) General. The acquisition of government regulated telecommunications services from a franchised local exchange company (LEC)/Telephone Company (TELCO) for any given DoD installation is facilitated by a contractual arrangement which provides a written instrument of understanding between the Department of Defense (DoD) and the LEC/TELCO which sets forth the basis under which future procurements will be entered into as required during the term of the agreement. The Defense Communication Agency (DCA), Defense Commercial Communications Organization (DECCO) shall enter into such contractual

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arrangements on behalf of the DoD with all TELCOs located within the United States unless otherwise negotiated between DECCO and the service's communications acquisition command.

(b) Basic Agreements. The instrument of understanding specified in 37.7406-2(a) above is referred to as a Basic Agreement. Basic Agreements, known as "general contracts" within the communication industry, are widely used to facilitate awards for communication services. Such an instrument is not a contract, but rather represents a written instrument of understanding executed between a procurement activity and a communications LEC/TELCO which sets forth the negotiated contract clauses and other matters which shall be applicable to future procurements entered into between the parties during the term of agreement. The basic agreement together with the orders issued thereunder (see 37.7406-2(c)) represents the contract. There shall be a single contract executed between the Government and the TELCO, composed of the basic agreement and all orders issued for government regulated/TELCO franchised service, per DoD installation. The expiration of such contracts shall occur not later than the tenth anniversary of the issuance of the first order against the basic agreement. Basic agreements shall not be used in any manner to restrict available competition. All basic agreements will be executed in the name of the United States Government.

(c) Orders issued against basic agreements. A DD Form 1155 shall be used to order services under the basic agreement and to modify, cancel, or terminate services. As a general rule, prices should be established prior to authorizing the contractor to begin work. However, when the contractor is allowed to begin work prior to pricing in accordance with this paragraph, an estimated price or ceiling shall be included; and the contractor and the contracting officer shall proceed with definitive pricing as soon as practicable. In addition, an order may be issued which includes a monetary ceiling or series of ceilings for the stated services. This type of order is called a "maximum limit authorization" in the communications industry. This maximum limit authorization also may provide, in addition to the established ceilings, limited authority to designated individuals to issue work orders within the dollar ceilings for specified contract services. The contracting officer shall review the status of work orders quarterly to assure funds have not been overobligated, all work ordered is within the scope of the contract and that LEC/TELCO performance is in accordance with the contract. Each order or modification placed by the contracting officer against the Basic Agreement shall be subject to such reviews, approvals and determinations and findings specified in this supplement as would be applicable if the order were a contract entered into apart from the Basic Agreement.

(1) Orders for Special Assembly and Construction.

(i) General. Orders for special assembly and/or construction shall be issued as an order against the basic

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agreement, specifying separate contract line items and delivery dates/performance periods for the work ordered.

(ii) Orders for special construction may involve the following costs:

(A) contingent liability for utilizing the services for a shorter period of time than the specified minimum to reimburse the contractor for his unamortized nonrecoverable costs and usually expressed in terms of termination liability, as provided in the contract or by tariff;

(B) a one-time special construction charge;

(C) recurring charges for constructed facilities;

(D) a minimum service charge;

(E) an expediting charge; or

(F) a move or relocation charge.

(iii) When an LEC/TELECO submits a proposal or quotation of charges which indicates that special construction will be necessary, he shall be required to submit a detailed special construction proposal as well. All special construction proposals shall be analyzed to (1) determine the adequacy of the proposed construction; (2) disclose excessive or duplicative construction; and (3) when different forms of charge are possible, ensure that the form most advantageous to the Government is provided for.

(iv) When possible, special construction charges should be analyzed and approved prior to provision of the service. If, because of operational requirements, prior approval is not possible and a contractor is authorized to proceed, a ceiling cost for the special construction shall be imposed and sufficient funds obligated by the order to cover the ceiling price.

(v) Special construction provisions shall be administered by the contracting officer issuing the order. This involves administration of the cost and payment provisions, recording the unamortized termination liabilities (if any), and monitoring minimum service charges (MSC) reuse of MSC facilities--all in coordination with the requiring department, office, or agency, and with the Defense Contract Audit Agency, as appropriate.

(vi) Applicability of Construction Labor Standards to orders for Special Construction.

(A) The construction labor standards in FAR 22.4 ordinarily do not apply to "special construction." However, if the special construction includes construction (as defined in FAR 36.102) of a public building or public work, the construction labor standards may be applicable. Applicability must be determined under FAR 22.402.

(B) Individual orders subject to construction labor standards under FAR 22.402 shall specifically recite that fact.

(vii) Special Assembly Rates. Special assembly rates and charges shall be negotiated and contractually incorporated prior to commencement of service. When it is not possible to negotiate in advance, ceiling rates and charges shall be imposed and sufficient funds to cover the ceiling price obligated by the order.

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37.7406-3 Federal supply Schedule Contracts. General Services Administration Federal Supply Schedule contracts covering communication services, including equipment and facilities incidental to the services, are optional for use by the Department of Defense and may be used in accordance with FAR 8.404 when it is not more advantageous to negotiate a separate contract.

37-7407. Funding of Telecommunication Services.

(a) Funding is a comptroller responsibility and shall be handled in accordance with appropriate Department of Defense comptroller related directives and department implementations thereof.

(b) The contracting officer shall assure sufficient funds are available for the telecommunication service being acquired prior to authorizing the commencement of work. Contract actions authorizing service and committing the Government to pay for such service shall obligate such funds necessary to compensate the contractor in accordance with the contract.

(c) In acquisitions of communication services, unlike other types of acquisitions, obligations are usually recorded when the service starts or if and when a cancellation or termination is ordered. Thus, funds are not obligated by the Basic Agreement but are ordinarily obligated by orders issued under the Basic Agreement (see 52.237-7408, Ordering of Facilities and Services--Common Carriers).

(d) Each individual order establishes a basis for the obligation of funds to cover recurring charges for services to be provided during the fiscal year in which the order is issued, together with such one-time charges as are applicable to those services. Obligation of funds for recurring charges for subsequent fiscal years must be subject to the availability of appropriations and in the event funds are not appropriated, a cancellation or termination order must be issued.

37.7408 Competition for Telecommunication Services.

(a) Telecommunication services shall be acquired competitively or be excluded from less than full and open competition in accordance with part 6.

(b) Telecommunication equipment contract modifications or Communication Service Authorization (CSA) modifications, made against telecommunication industry pre-deregulation contracts, may lease additional quantities of telecommunication equipment noncompetitively and without justification provided such lease is within the scope of the existing contract. The requiring activity shall submit to the contracting officer all necessary information required to determine if the additional equipment is within scope. The contracting officer shall make this determination and document the file. As such, pre-deregulation

equipment leases, entered into via CSA, was the regulating governmental body's approved method for ordering service, the contracting officer may continue to consider such pre-deregulation CSA equipment leases to be orders for service until contract expiration or termination.

(c) Acquisition planning for all telecommunication services, including equipment leases as specified in 37.7407(b) above, shall assure that competition is not compromised by requiring specific services or equipment, available solely from a government regulated common carrier, when equivalent nongovernment regulated service is available from other sources.

(d) Telecommunication services available from government regulated common carriers only shall be excluded from less than full and open competition in accordance with part 6. As part of the justification, the contracting officer shall cite the authority granting the common carrier exclusive rights to offer such service (i.e., tariff, FCC ruling, public utility commission ruling, etc).

37.7409 Cost or Pricing Data.

(a) Rates or preliminary estimates quoted by a common carrier for tariffed services are considered to be prices set by regulation within the provisions of Public Law 87-653, even if the tariff will not be established until after execution of the contract. Accordingly, except as provided in (b), common carriers are not required to submit cost or pricing data prior to award of contracts for tariffed services. On the other hand, rates or preliminary estimates quoted by a common carrier for nontariffed service or by a noncommon carrier for any service are not considered to be prices set by regulation; and the provisions of Public Law 87-653 and FAR 15.804 shall be applied accordingly.

(b) Even when not required by Public Law 87-653, certified cost or pricing data shall be obtained whenever the contracting officer is unable to determine that the prices are reasonable on the basis of price analysis (see FAR 15.805-2). However, certified cost or pricing data shall not be required to support annual recurring costs below \$5,000 and nonrecurring costs or basic termination liabilities below \$10,000. Situations in which cost or pricing data may be found necessary within the above policy are:

(1) a tariff, whether filed or contemplated to be filed is for new services installed or developed primarily for Government use (and the data shall cover special construction charges in connection therewith);

(2) a tariff, whether filed or contemplated to be filed, in which specific rates and charges are not included;

(3) more than one commercial source (one or more of which is a noncommon carrier) can offer the desired service but price competition is not considered adequate;

(4) to support the reasonableness of special assembly rates and charges;

(5) to support the reasonableness of special construction and equipment charges;

(6) to support the reasonableness of those contingent liabilities which are fixed at the outset of the service; or

(7) to support proposed cancellation and termination charges (pursuant to the clause entitled "Cancellation or Termination of Orders") and reuse arrangements (pursuant to the clause entitled "Reuse Arrangements").

(c) Cost of pricing data need not be obtained for each order in the case of services obtained by delivery order under a general call type contract which is negotiated for use by Government ordering activities and includes detailed and approved price schedules as a part of the general contract.

(d) As to the form and detail of cost or pricing data, the following will apply:

(1) for data submitted by common carriers, the data may be in the same form and detail normally submitted to the governmental regulatory body having jurisdiction over the carrier in question; provided, this form and detail is sufficient for the Government to make an adequate evaluation.

(2) for data submitted by other than common carrier, the data should be that required by FAR 15.8.

(e) In the case of noncommon carriers or common carriers quoting for services not to be furnished pursuant to tariff, the contracting activity shall require that the cost or pricing data be accompanied with a certificate as required in FAR 15.804-4. In the case of a common carrier furnishing service pursuant to a tariff filed or to be filed, the contracting activity shall require that data submitted pursuant to (b) above be accompanied with a certificate that to the best of the company's knowledge the data are accurate, complete, and a statement that either:

(1) the rates for services in question are based on these data which will be used or are currently being used to justify the tariff for such service; or

(2) the rates for services in question are not based on these data but are based upon filed tariffs. The contracting activity shall inform carriers required to furnish cost or pricing data under this subparagraph (e) that the data and certifications will be used by the Government, if appropriate, in any subsequent proceedings relative to this tariffed service.

(f) If any noncommon carrier or any common carrier providing a service not to be furnished pursuant to tariff refuses to furnish cost or pricing data required under this paragraph, applications for waiver shall be processed in accordance with FAR 15.804.

37.7410 Periods of Performance.

(a) All telecommunication service contracts, Communication Service Authorizations (CSA), work orders, and modifications thereto shall specify a period of performance.

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(b) In accordance with the Federal Property and Administrative Services Act, as amended, contracts for communication services extending beyond the fiscal year, but no longer than 10 years may be entered into (see FAR Subpart 37.7040-1(a)).

37.7411 Quality Assurance Requirements.

(a) Quality assurance shall be provided for in accordance with part 46.

(b) Prior to ordering telecommunication services, the requiring activity shall designate, to the contracting officer, a technically competent quality assurance evaluator (QAE) and provide the contracting officer a quality assurance plan by which the QAE shall monitor contractor performance.

(c) The QAE shall document contractor nonperformance and report such nonperformance to the contracting officer for action.

37.7412 Telecommunication Specifications.

(a) The Government's telecommunications specifications, standards, and other purchase descriptions shall be prepared in accordance with part 10.

(b) Government requirements, specifications, standards, and other purchase descriptions shall be prepared independent of potential suppliers. Government requirements should be prepared using internal resources, separate contracts for technical support, or two-step sealed bidding.

(c) Requirements, plans, specifications, etc, shall not be prepared in such a way as to restrict competitive sources or unnecessarily require the use of government regulated common carriers.

37.7413 Review of Tariffs.

(a) Contractual arrangements between the government and its telecommunication common carriers may be affected by tariffs approved or modified by appropriate government regulatory bodies. As such, it is critical that the government be aware of common carrier proposed tariffs; review them; and represent its interest during the regulatory hearing process.

(b) The services shall provide for reviewing all tariffs affecting DOD installations, assessing the effect and representing the Government's interest at the regulatory body's hearings. These tasks shall include assessing proposed tariffs effects on an installation-by-installation basis. Coordination between installation, legal, contracting, and other appropriate government personnel shall be provided for.

37.7414 Cancellation and Termination.

(a) Cancellation is the discontinuance of a requirement subsequent to the placing of an order, but prior to initiation of service.

(b) Termination is the discontinuation of a service for the convenience of the Government after the service has been initiated.

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(c) Cancellation or termination charges shall be determined in accordance with the provisions of the applicable tariff or contract.

(d) At the conclusion of a cancellation or termination settlement negotiation, the contracting officer shall document the contract file as to the principal elements involved in the settlement and in a manner which will enable reviewing authorities to understand the appropriateness of the proposed settlement.

(e) Pursuant to the Cancellation or Termination of Orders clause, partial payments on cancellation or termination claims may be made prior to settlement under the applicable policy and procedures of FAR 49.112-1.

37.7415 Contract Clauses.

(a) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common or a noncommon carrier is contemplated.

(1) The clause at 52.237-7400, Definitions (Communications);

(2) The clause at 52.237-7401, Patent Indemnity (Communications);

(3) The clause at 52.237-7402, Access;

(4) The clause at 52.237-7403, Amendment of Contract; and

(5) The clause at 52.237-7404, Obligation of the Government.

(b) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract for communications services with a common carrier is contemplated.

(1) The clause at 52.237-7405, Authorization and Consent--Common Carriers;

(2) The clause at 52.237-7406, Continuation of Orders;

(3) The clause at 52.237-7407, Facilities and Services to be Furnished--Common Carriers;

(4) The clause at 52.237-7408, Ordering of Facilities and Services--Common Carriers;

(5) The clause at 52.237-7409, Rates, Charges, and Services--Common Carriers;

(6) The clause at 52.237-7410, Payment--Common Carriers;

(7) The clause at 52.237-7411, Tariff Information;

(8) The clause at 52.237-7412, Cancellation or Termination of Orders--Common Carriers;

(9) The clause at 52.237-7413, Reuse Arrangements;

(10) The clause at 52.237-7414, Submission of Cost or Pricing Data--Common Carriers;

(11) The clause at 52.237-7415, Audit and Records--Common Carriers; and

(12) The clause at 52.237-7416, Term and Termination of Contract--Common Carriers.

(c) The contracting officer shall insert the following clauses, modified if necessary, to meet the specific requirements of an appropriate governmental regulatory agency or when the basic intent is not changed, in solicitations and contracts when a contract with a common or a noncommon carrier is contemplated and when special construction charges are expected:

(1) The clause at 52.237-7417, Special Construction and Equipment Charges; and

(2) The clause at 52.237-7418, Title to Communication Facilities and Equipment.

20 August 1985

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OG 8-3
Attachment 1

WORKSHEET
Publicizing Proposed Procurement Regulations
(Public Law 98-577)



Public comments are not necessary because this proposed regulation does not have significant cost or administrative impact on contractors or offerors -and does not have significant effect beyond the internal operating procedures of the DOD.



Public comments are not necessary because the policies and procedures contained in this proposed regulation have already been publicized in the Federal Register by a higher or other authority

(who/what/when)

and the net effect of this proposed regulation over and above the referenced publicized policies and procedures does not cause additional significant cost or administrative impact on contractors or offerors -and does not have additional significant effect beyond the internal operating procedures of the _____.



Public comments are necessary. The proposed regulation will be publicized in the Federal Register as a proposed rule for a _____ day period after which any comments received will be considered before the regulation is issued as a final rule.



Public comments are necessary, but the regulation must be issued immediately because urgent and compelling circumstances make waiting or the publicizing period impracticable. Therefore, the regulation will be simultaneously published in the Federal Register for _____ day period as an interim rule, after which any comments received will be considered the regulation modified as appropriate, and the policy published as a final rule. The urgent circumstances are: _____

OG 8-3
Attachment 2

WORKSHEET
Regulatory Flexibility Act (RFA)
(P.L. 96-354)

a. Applicability

☒ RFA is not applicable because the proposed policy does not have a significant cost or administrative impact on contractors or offerors and does not have a significant effect beyond the internal operating procedures of the DoD activity.

☐ RFA is not applicable because the proposed policy applies (1) to rates, wages, corporate or financial structures or reorganizations or (2) to prices, facilities, appliances, services, or allowances therefor, or (3) to valuations, costs or accounting, practices relating to such rates, wages, structures, prices, appliances, services a allowances.

☐ RFA is applicable (proceed to paragraph b.)

b. Regulatory Flexibility Analysis

OG-8-3
Attachment 3WORKSHEETPaperwork Reduction Act, P.L. 96-511
(44 U.S.C. 3501 et. seq. and 5 CFR 1320)

1. Applicability

- a. ☐ The proposed policy will collect information by general requests to ten or more offerors or contractors to submit, maintain retain or disclose information.

JUSTIFICATION STATEMENT NOT REQUIRED.

- b. ☐ Does the information being collected fall into one of the following categories:
- (1) affidavits or certifications,
 - (2) samples of products,
 - (3) parts obtained through observation by the agency,
 - (4) parts submitted in response to requests for comments from the public in the Federal Register or similar publications,
 - (5) requests addressed to a single person,
 - (6) facts obtained through nonstandarized follow-up questions designed to clarify responses to general requests for information,
 - (7) information from individuals under treatment or for purposes of clinical examination,
 - (8) examinations intended to test aptitude, abilities or knowledge of persons tested,
 - (9) information obtained at or in connection with public hearings or meetings,
 - (10) provisions for offerors or contractors to request waivers, and
 - (11) requests to acknowledge receipt of purchase orders.

OG-8-3

Attachment 3

- c. ☐ The time and financial resources necessary to comply with a collection of information would be incurred by persons in the normal course of their business activities.

(Please explain)

- d. ☐ The collection of information is associated with the Acquisition Management System and Data Requirements Control List (AMSDL). A separate clearance has been obtained for information collections associated with the AMSDL. Cases need only rewrite this fact, NOTE: The applicable DID, and provide language on inclusion in FAR 1.105 indicating that the requirement is cleared under the appropriate AMSDL Number (currently 0704-0188).

- e. ☐ The information collection is being required in the DFARS to satisfy the requirements of another federal agency.

(Please explain)

- f. ☐ The information collection does not require offeror/contractor action but is internal to the Government.

- g. ☒ The proposed policy adds contractual language but does not require the contractor to file reports, fill out forms, or keep records.